Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-158

BOARD OF TRUSTEES OF THE UNIVERSITY OF TENNESSEE and EDWARD J. BOLING,

Petitioners,

v.

DR. RAJ P. SONI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RONALD C. LEADBETTER,
JOHN C. BAUGH,
ARTHUR B. STOWERS, JR.,
DANIEL F. B. RHEA,
810 Andy Holt Tower,
Knoxville, Tennessee 37916,

Attorneys for Petitioners.

TENNESSEE LAW PRINTERS, P. O. Box 277, Knoxville, Tennessee, Phone 525-4202

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DR. RAJ P. SONI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of The United States Court of Appeals for the Sixth Circuit in this case.

JURISDICTIONAL STATEMENT

The judgment of The Court of Appeals was entered on March 12, 1975. A timely petition for rehearing was filed and was denied on June 5, 1975 (Appendix C, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CITATIONS TO OPINIONS BELOW

The opinion of the District Court (Appendix A, *infra*). is reported at 376 F. Supp. 289. The opinion of The Court of Appeals (Appendix B, *infra*) is reported at 513 F.2d 347.

QUESTIONS PRESENTED

1. Did the provisions of Tennessee Code Annotated 49-1303 prevent the Respondent, while a non-citizen of the United States, from obtaining a property interest in future and continued or permanent employment from The University of Tennessee?

2. Did the existence of a formal tenure system of The University of Tennessee preclude Respondent from obtaining de facto tenure from The University of Tennessee in a manner contrary to or inconsistent with the provisions and requirements of the formal tenure system?

3. If Respondent was not precluded from obtaining de facto tenure from The University of Tennessee in a manner contrary to and inconsistent with the provisions and requirements of the University's formal tenure system, did Respondent in fact obtain such de facto tenure?

4. Does the provision of the Charter of The University of Tennessee that the University may "sue and be sued" constitute a waiver of the University's Eleventh Amendment immunity, as a state agency, such that the property of the University is subject to divestiture through exercise of judicial power?

STATUTORY PROVISIONS INVOLVED

1. The Court of Appeals declined to apply or explain its refusal to apply to the cause of action before this Court Section 49-1303 of Tennessee Code Annotated, which provides in pertinent part:

> "It shall be unlawful for the trustees of the University of Tennessee, the state board of education, or any county or city board of education, or any other person to employ any superintendent, principal, teacher, tutor, supervisor, or other person to have in any way the custody and care of students of the public educational institutions of this state who is not a citizen of the United States of America; provided that nothing in this section shall be construed to prohibit arrangements whereby professors and teachers who are citizens of other nations may be employed on a temporary basis on the faculties of colleges, universities or public schools in Tennessee."

2. Involved in the question of whether or not The University of Tennessee has waived its immunity from suit and/or immunity of its property from divestiture through exercise of judicial power is Section 20-1702 of Tennessee Code Annotated which provides:

> "No court in the state shall have any power, jurisdiction, or authority to entertain any suit against the state, or against any officer of the state acting by authority of the state, with a view to reach the state, its treasury, funds, or property, and all such suits shall be dismissed as to the state or such officers, on motion, plea, or demurrer of the law officer of the state, or counsel employed for the state."

3. Involved in the same question is Chapter 64, Section 1 of the Acts of Tennessee of 1807 which provides, in reference to the Trustees of The University of Tennessee:

> "The said trustees and their successors by the name aforesaid, may sue and be sued, plead and be impleaded, in any court of law or equity in this State or elsewhere."

STATEMENT

In September 1967 Respondent, Dr. Raj P. Soni, joined the Mathematics Department of The University of Tennessee as a Visiting Associate Professor.

On several occasions during the 1967-1968 school year Respondent made known to the head of the Mathematics Department, first Professor John H. Barrett and then his successor Dr. Donald J. Dessart, his concern over the permanency of his employment with the University and his desire that a decision be made one way or the other.

As a result of Respondent's concern an effort was made to have the question of his tenure considered at a faculty meeting scheduled for October 29, 1968. Prior to that meeting Dr. Dessart consulted with the General Counsel of the University concerning the possibility of tenure for Respondent. As a result of his consultation with the General Counsel, Dr. Dessart advised the faculty that Respondent was not a citizen of the United States and therefore could not be considered for a grant of tenure because Tennessee law and a University regulation adopted pursuant to the law prohibited a grant of permanent employment to non-citizens of the United States.

The faculty did, however, vote to recommend Respondent for an appointment as "Associate Professor without tenure." A letter dated October 29, 1968, was sent by

Dr. Dessart to Respondent which provided in pertinent part:

> "Dear Raj:
>
> "It is a pleasure to inform you that at a meeting of the tenured associate and full professors of the Department of Mathematics, it was recommended that you be appointed an associate professor without tenure effective July 1, 1969. The question of recommending tenure will be considered by - similar departmental group at the time you become a citizen of the United States. In addition, it was recommended that you receive the full benefits of participation in TIAA/CREF at the first feasible opportunity, which will probably be September 1, 1969."

Respondent participated in the University retirement system, attended departmental meetings and was permitted by the head of the Department of Mathematics to vote on recommendations of tenure for other faculty members although the acquisition of tenure was not a prerequisite to such activities.

Respondent was rehired for the 1969-70, 1970-71, and 1971-72 school years.

On December 15, 1971, Respondent became a citizen of the United States. Soon thereafter, on February 10, 1972, a meeting of the tenured faculty was scheduled for the purpose of considering Respondent for a recommendation of tenure. At that meeting the faculty voted not to recommend Respondent for a grant of tenure.

On March 8, 1972, the then head of the Department of Mathematics Dr. Harry T. Mathews notified Respondent by letter that his appointment would be terminated as of August 31, 1973.

Respondent was not provided a due process hearing of the type accorded tenured members of the faculty but did appeal his termination through the appropriate administrative channels of the University up to and including the Board of Trustees.

Respondent filed a Complaint with the District Court on August 24, 1973, asserting that he had been granted tenure by The University of Tennessee, that he had obtained an expectancy of continued employment which amounted to a property right and, therefore, that he was denied due process when terminated without a due process hearing.

The District Court entered judgment in favor of Respondent on February 21, 1974, holding Respondent to be entitled to back pay from August 31, 1973, until such time as The University of Tennessee provides a due process hearing of the type to which faculty members having a property interest in continued employment are entitled.

The District Court held that there existed sufficient objective evidence to vest in Respondent a reasonable expectation of future and continued employment notwithstanding Respondent's awareness of the State law and University rule which prohibited a grant of permanent employment to a non-citizen of the United States, Respondent's receipt of a letter in 1968 informing him that the position for which he had been recommended was "without tenure" and the existence of a formal tenure policy of the University.

Petitioners appealed to The Court of Appeals which, by opinion entered March 12, 1975, affirmed the judgment and findings of the District Court and additionally ruled that The University of Tennessee had by provision of its Charter that it may sue and be sued, waived immunity accorded by the Eleventh Amendment to State instrumentalities.

Petitioners petitioned The Court of Appeals for a rehearing which petition was denied by The Court of Appeals by order entered June 5, 1975.

REASONS FOR GRANTING THE WRIT

QUESTION 1

DID THE PROVISIONS OF TENNESSEE CODE ANNOTATED 49-1303 PREVENT THE RESPONDENT, WHILE A NON-CITIZEN OF THE UNITED STATES, FROM OBTAINING A PROPERTY INTEREST IN FUTURE AND CONTINUED OR PERMANENT EMPLOYMENT FROM THE UNIVERSITY OF TENNESSEE?

There is a conflict between the provisions of a Tennessee statute and the Tennessee Supreme Court and the Sixth Circuit Court of Appeals on this question which warrants resolution by this Court.

Section 49-1303 of Tennessee Code Annotated provides in pertinent part:

> "It shall be unlawful for the trustees of the University of Tennessee ... to employ any ... teacher ... to have in any way the custody and care of students of the public educational institutions of this state who is not a citizen of the United States of America; provided that nothing in this section shall be construed to prohibit arrangements whereby professors and teachers who are citizens of other nations may be employed on a temporary basis on the faculties of colleges, universities or public schools in Tennessee;"

The Tennessee Supreme Court has held that by virtue of this statutory provision a non-citizen of this country "had no rights as a teacher whatever," and therefore was

not entitled to have specific charges filed against her and a hearing. *State v. City of Knoxville*, 176 S.W.2d 801, 803 (1944). The Court held that the law could not be changed by the State Board of Education through the issuance of a teaching certificate and that such certificate was *void ab initio*. *Id.* pp. 802, 803.

In direct conflict with the restrictions imposed by the Tennessee statute and the ruling of the Tennessee Supreme Court, the Court of Appeals held that Respondent, while a non-citizen of the United States, had obtained a cognizable property interest in the form of a reasonable expectation of future and continued employment (App. B, *infra*, pp. 30-35), a relative degree of permanency as an employee (*Ibid.*), an understanding that his employment would continue on a permanent basis (*Id.*, p. 33), and a right to a due process hearing prior to termination (*Ibid.*).

Contrary to the holding of the State Supreme Court the Sixth Circuit, by holding that certain actions on the part of faculty members and others created in Respondent a property interest of the very type prohibited by state law, held that acts in violation of that law may be legally effective and not *void ab initio*.

It is significant that neither the District Court nor the Court of Appeals explained *why* the provisions of T.C.A. 49-1303 did not prevent Respondent from obtaining the claimed property interest.

It is also significant that the constitutionality of the statute was not an issue and was not a basis for either court's decision (App. A, *infra*, p. 22 fn. 2); (App. B, *infra*, p. 21 fn. 1).[1]

[1] A review of the constitutionality of T.C.A. 49-1303 would have necessitated a ruling on two additional contentions raised by Petitioners in both Courts below but not spoken to by either Court: (1) Respondent was barred

(Continued on following page)

A resolution of this question is of critical importance to Petitioners, as it undoubtedly is to every other educational institution in Tennessee. The critical aspect of the question concerns not whether citizens should or should not be treated equally with citizens for employment purposes but whether or not hundreds or even thousands of non-citizens or naturalized citizens who have at some time in the past been denied *consideration* for permanent employment (i.e. tenure) may now claim the *possession* of such property interest arising mysteriously from the inaction (rather than negative or conditional action) of Petitioners. Such an occurrence has serious economic and operational implications for Petitioners (e.g. a potential ballooning of the total number of Petitioners' tenured faculty resulting in a distortion of the recommended tenured-non-tenured faculty ratio which would necessitate future grants of tenure for a period of time thereby damaging the Petitioners' ability to attract new faculty members).

(Continued from preceding page)

from this action by his failure to commence action within one year of the date (October 29, 1968) on which he was refused consideration for tenure on the basis of his non-citizenship as required by Tennessee Code Annotated 28-304 which provides that "... civil actions for compensatory ... damages ... brought under the federal civil rights statutes ... shall be commenced within one (1) year after cause of action accrued." See also **Johnson v. Railway Express Agency, Inc.**, 43 L.W. 4623 (May 19, 1975); (2) Respondent's cause of action is moot: A successful challenge of a statute denying permanent employment to non-citizens would properly result in a judicial order that Respondent be considered for such employment (i.e. tenure) in the same manner in which citizens are considered. Respondent had, however, been granted precisely such consideration upon becoming a citizen (On February 10, 1972, the mathematics faculty voted not to recommend Respondent for tenure). Therefore, such a judicial order would in effect require to be done that which had already been done.

Furthermore, as a result of the Sixth Circuit's decision, Petitioners find themselves in the unenviable position of having complied for many years in good faith with the law of Tennessee only to find that they face dire consequences for having done so. Such considerations warrant the review of the Court of Appeals' decision by this Court.

QUESTION 2

DID THE EXISTENCE OF A FORMAL TENURE SYSTEM OF THE UNIVERSITY OF TENNESSEE PRECLUDE RESPONDENT FROM OBTAINING DE FACTO TENURE FROM THE UNIVERSITY OF TENNESSEE IN A MANNER CONTRARY TO OR INCONSISTENT WITH THE PROVISIONS AND REQUIREMENTS OF THAT FORMAL TENURE SYSTEM?

There is a conflict between the Court of Appeals for the Sixth Circuit and the Court of Appeals for the Eighth Circuit concerning the significance of the holding of this Court that:

> "There may be an unwritten 'common law' in a particular university that certain employees shall have the equivalent of tenure. This is particularly likely in a college or university ... that has no explicit tenure system ... but that nonetheless may have created such a system in practice." *Perry v. Sindermann*, 408 U.S. 593, 602 (1972).

The Sixth Circuit recognized the existence of a formal tenure policy of The University of Tennessee (App. B, *supra*, p. 31). However, the Sixth Circuit held that the existence of a well established tenure system did not prevent an individual, such as Respondent, who had not been granted formal tenure, from acquiring a reasonable expectation of continued employment. This holding was based

on the Sixth Circuit's conclusion that this Court "did not say, as it easily could have, that a reasonable expectancy cannot arise in the context of a formal tenure system" (*Id.*, p. 33). On the basis of this conclusion the Sixth Circuit held, as previously noted, that Respondent had a property interest and was therefore entitled to a due process hearing prior to termination.

The Court of Appeals for the Eighth Circuit has reached a directly conflicting position on the same question in *Cusumano v. Ratchford*, 507 F.2d 980 (1974).

The pertinent facts in *Cusumano* are identical to those in Soni. A formal tenure policy was in existence at The University of Missouri which, like the tenure policy of The University of Tennessee, expressly provided the method by which tenure was granted.

In both cases, the faculty member(s) was not granted tenure in accordance with the provisions of the formal tenure policy. Also, in both cases the faculty member(s) was notified of his (their) non-retention by the employing University but was not provided with a specific reason for non-retention (Respondent was generally informed that he was not of the quality expected of the tenured staff of The University of Tennessee).

The faculty member(s) in both cases claimed to have obtained de facto tenure notwithstanding the formal tenure policy.

The Eighth Circuit, however, reached a decision contrary to the Sixth Circuit holding that the plaintiffs before that Court had not obtained de facto tenure or property interest and did not have a right to a pre-termination hearing. *Cusumano*, *supra*, p. 987.

The Eighth Circuit, in reaching this position, referred to the holding of this Court in *Perry*:

> "The entire thrust of the tenure regulations is to avoid the de facto tenure hypothesized in *Sindermann*, *supra*, 408 U.S. at 602, 92 S. Ct. at 2700, amounting to 'an unwritten common law' in a particular university that certain employees shall have the equivalent of tenure." *Cusumano*, *supra*, p. 984.[2]

The tenure policy of The University of Tennessee (App. A, *supra*, p. 21, fn. 1); (App. B, *supra*, p. 38, fn. 1) is quite obviously intended for the same purpose.

A resolution of this question is of extreme importance to Petitioners. The position of the Sixth Circuit unless reversed renders the formal tenure policy of The University of Tennessee useless since, in the opinion of the Sixth Circuit, "The existence of such a system is but one factor ... to consider in analyzing the due process claim of a formally non-tenured professor" (*Id.*, p. 33). In light of the Sixth Circuit ruling there clearly can be no policy which, however skillfully drafted, precludes unexpected claims of tenure; always there is the danger to the University that a faculty member may defeat the best planned intentions of the University to deny him tenure simply by offering "other evidence" in support of his claim of a property interest.

The official records of the University promulgated pursuant to the tenure policy which provides that "the precise terms and conditions of every appointment should be stated

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[2] In another case involving a Missouri educational institution a district court held that "expectancy of future and continued employment is not a factor where a university has an existing tenure system." **Watts v. Board of Curators, University of Missouri**, 363 F. Supp. 882 (1973).

in writing and be in the possession of both institution and teacher before the appointment is consummated" (App. B, *supra*, p. 39) are likewise rendered meaningless by the Sixth Circuit. For example, the Sixth Circuit noted that Respondent was notified in writing by the department chairman that "It was recommended that you be appointed an associate professor without tenure ... The question of recommending tenure will be considered by a similar departmental group at the time you become a citizen of the United States" (*Id.*, p. 30). Nevertheless the Court went on to say that Respondent had a viable understanding that his employment would continue on a permanent basis with the Department of Mathematics, *notwithstanding* the statement contained in the October 29 correspondence that [Dr. Soni's] position was one without tenure (*Id.*, p. 33).

The official personnel status change form referred to in the tenure policy of the University (*Id.*, p. 41) and which in Respondent's case expressly classified his position effective July 1, 1969, as "Associate Professor (without tenure)" (See Exhibit E, *supra*) was likewise disregarded by the Court of Appeals.

In addition to destroying the ability of the University to place reliance on its own records, it is certain that morale problems will develop among faculty members who have survived the rigorous examination of their peers and superiors pursuant to the formal tenure policy of the University only to discover that tenure status has been gained by other faculty members who have obtained the same status by some unofficial means.

QUESTION 3

IF RESPONDENT WAS NOT PRECLUDED FROM OBTAINING DE FACTO TENURE FROM THE UNIVERSITY OF TENNESSEE IN A MANNER CONTRARY TO AND INCONSISTENT WITH THE PROVISIONS AND REQUIREMENTS OF THE UNIVERSITY'S FORMAL TENURE SYSTEM, DID RESPONDENT IN FACT OBTAIN SUCH DE FACTO TENURE?

This Court, in *Perry*, held that:

> "A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or *mutually explicit* understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing." *Perry*, *supra*, p. 602 (emphasis supplied).

However, this Court warned that a "mere subjective expectancy" is not protected by procedural due process. *Perry*, *supra*, p. 603.

The Sixth and Eighth Circuits have reached widely divergent positions regarding the scope of this holding.

The Sixth Circuit ruled that Respondent met the requirements of *Perry* and did not have a "mere subjective expectancy" of future, continued and permanent employment even though: (1) the head of the Mathematics Department pointed out to the faculty attending the October 29, 1968, meeting that Respondent "could not be appointed formally to a permanent position in view of the University regulations and a state law" (App. B, *supra*, p. 29), (2) no vote was taken at that meeting to appoint Respondent to a permanent position. *Ibid.*, (3) a formal letter was sent from the department head to Respondent on the same date informing him that he had been recommended for an ap-

pointment as "associate professor without tenure" and that the question of recommending him for tenure "will be considered ... at the time you become a citizen of the United States" (*Id.*, p. 30); (4) Respondent was aware of the disqualifying statute and University regulation (*Id.*, p. 31); (5) a specific tenure policy existed which stated the specific manner in which promotions were to be obtained: "recommendations are made by the department head to the dean of the college ... (who) forwards his recommendation to the Academic Vice President, who ... submits his recommendation to the President. After Presidential action, the Board of Trustees acts on the recommendation" (App. A, *supra*, p. 21 fn. 1); (6) the evidence offered by Respondent in support of his claimed property interest was derived from individuals *not* authorized to grant tenure, and not even claimed by Respondent to be so authorized (i.e. the department head and faculty members) (App. B, *supra*, pp. 28-32) (see also Exhibit D, *supra*, p. 44); (7) the evidence derived even from these unauthorized sources was completely speculative and subjective, i.e. Respondent was "congratulated" following the October 29 meeting (App. B, *supra*, p. 30), Respondent was told by the department head that the faculty wanted Respondent to stay at the University, that the meeting had been "favorable" and that Respondent's "prospects with the University were good" (*Ibid.*); (8) the only item of evidence presented by Respondent which was not derived from the utterances of non-officials of the University was the Respondent's inclusion in the TIAA/CREF retirement program of the University, a program mistakenly characterized by the Sixth Circuit as "*ordinarily* available only to permanent personnel" (*Id.*, p. 31). This benefit was granted to Respondent in the same letter by which Respondent was informed of his recommendation for an appointment "*without tenure*" (*Id.*, p. 30). Moreover, the head of the

Mathematics Department testified that a person was not required to have tenure in order to participate in the TIAA/CREF retirement program (App. D, *supra*, pp. 45). There was absolutely no presentation of evidence that non-tenured faculty were *not* permitted to participate in the retirement program.

In *Cusumano*, the Eighth Circuit took a view of the *Perry* holding which sharply conflicted with the Sixth Circuit's.

Aside from the issue of whether or not de facto tenure can be obtained by a faculty member at an institution which possesses a formal tenure policy (the Eighth Circuit holds that it cannot, *supra*, at p. 11), the Eighth Circuit held that it could not find any reasonable expectancy of reemployment since written tenure regulations expressly provided for the termination of probationary employees or those without tenure (*Cusumano*, *supra*, at p. 984). The feeling of the Eighth Circuit clearly was that an individual could not reasonably expect to have a property interest where a formal tenure policy expressly provides the method by which such an interest is to be obtained and the claimed interest has not been obtained by that method.

The significance of the question is readily discernible. By the Sixth Circuit's interpretation of *Perry*, The University of Tennessee is bound not only by the utterances and actions of authorized officials such as Petitioners but also by the actions and utterances of others who have not been authorized to act for the University.

An incredible burden is placed on the University and its officials to monitor and disavow every action and utterance by faculty members, employees, and other individuals who, even though *authorized* by The University of Tennessee to grant tenure, might nevertheless create in some faculty member an expectancy of future and continued employment.

This Court is therefore respectfully urged to consider this question.

QUESTION 4

DOES THE PROVISION OF THE CHARTER OF THE UNIVERSITY OF TENNESSEE THAT THE UNIVERSITY MAY "SUE AND BE SUED" CONSTITUTE A WAIVER OF THE UNIVERSITY'S ELEVENTH AMENDMENT IMMUNITY, AS A STATE AGENCY, SUCH THAT THE PROPERTY OF THE UNIVERSITY IS SUBJECT TO DIVESTITURE THROUGH EXERCISE OF JUDICIAL POWER?

There is a conflict between the Tennessee Supreme Court and the Sixth Circuit.

The Sixth Circuit noted that the Charter of The University of Tennessee pursuant to legislative enactment of 1807 provided:

> "The said trustees and their successors by the name aforesaid, may sue and be sued, plead and be impleaded, in any court of law or equity in this State or elsewhere." (App. B, *supra*, p. 34). (See: Acts of Tennessee, 1807, Chapter 64, Section 1.)

The Courts of Appeals concluded that such provision constitutes a waiver of any Eleventh Amendment immunity which the University might otherwise have had (App. B, *supra*, p. 37) and therefore that the Eleventh Amendment did not bar a money judgment against the University (*Id.*, p. 38).

Tennessee Code Annotated 20-1702, enacted in 1873, conflicts with the opinion of the Sixth Circuit:

> "No court in the state shall have any power, jurisdiction, or authority to entertain any suit against the

state, or against any officer of the state acting by authority of the state, with a view to reach the state, its treasury, funds, or property, and all such suits shall be dismissed as to the state or such officers..."

The Tennessee Supreme Court has taken a position in direct conflict with the Sixth Circuit:

"... the state, and the public represented by it, must be considered as the owner of the property held by the University [of Tennessee] and that the sovereign character of the state's ownership is not changed by the creation of a corporation as a convenient means through which the state exercises the strictly governmental function of educating the youth among its citizens. We are not able to find that the state has lost or divested itself of any element of sovereignty in the creation of this corporation which is subject to the will of the legislative branch of the state government in every particular, and the only purpose of which is to perform a governmental function." *University of Tennessee v. People's Bank*, 6 S.W.2d 328 (1928).

This recognition of the state ownership and sovereign nature of property held by The University of Tennessee has been referred to by the State Supreme Court on various occasions. *Knoxville Housing Authority, Inc. v. City of Knoxville*, 123 S.W.2d 1085, 1086 (1939); *Baker v. Nashville Housing Authority*, 408 S.W.2d 651, 657 (1966); *Applewhite v. Memphis State University*, 495 S.W.2d 190, 197 (1973).

The Office of the Attorney General of the State of Tennessee has offered an opinion, also in conflict with the Sixth Circuit's opinion, which rules that The University of Tennessee is immune from suit by virtue of the 1873 statute, T.C.A. 20-1702 (App. F, *supra*).

Because a monetary judgment payable out of the property of The University of Tennessee has never, prior to this case, been entered against the University and because such a possibility threatens a most serious financial impact on the University and the State of Tennessee, this Court is urged to grant certiorari for the purpose of permitting complete briefing and argument on the question of whether or not The University of Tennessee has waived its immunity to the extent of subjecting its property to divestiture through exercise of judicial power.

CONCLUSION

For the reasons stated above, Petitioners respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

RONALD C. LEADBETTER
JOHN C. BAUGH
ARTHUR B. STOWERS, JR.
DANIEL F. B. RHEA
810 Andy Holt Tower
Knoxville, Tennessee 37916

Attorneys for Petitioners

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
Northern Division

DR. RAJ P. SONI,
Plaintiff,

v.

BOARD OF TRUSTEES OF THE UNIVERSITY OF TENNESSEE and EDWARD J. BOLING,
Defendants.

Civil Action No. 8378

MEMORANDUM

(Filed February 21, 1974)

Plaintiff, Dr. Raj P. Soni, a former nontenured professor with the Department of Mathematics of the University of Tennessee, brought this action against the University claiming he was not accorded procedural due process under the Fourteenth Amendment when the University refused to renew his contract without sufficient notice of charges against him and without a sufficient hearing. Plaintiff's principal claim is premised on the companion cases of Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), and Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). Jurisdiction is invoked under 28 U.S.C. §§1331, 1343(3).

In response to an increase in demand for mathematics professors in July 1967, defendant hired plaintiff as a visiting Associate Professor of Mathematics, such employment to commence in September 1967 and remain effective throughout the school year of 1967-1968. Prior to leaving the I.B.M.

Corporation in September 1967 to join the Math Department, plaintiff's full time teaching experience at the college level included six years as an instructor in India and one year as an associate professor at Oregon State University.

In response to previous personal inquiries regarding the permanency of his job status with the University, and, pursuant to the recommendation of the former head of the Department, Dr. Donald J. Dessart, then Acting Head of the Department of Mathematics, on October 24, 1968 advised the appropriate faculty members that a special meeting would be held on October 29, 1968 to consider approving plaintiff for a permanent appointment.[1]

Professor Shaffer, a tenured member of the Mathematics Department, testified that he attended the October 29 meeting but was advised by Dr. Dessart at that time that a vote on plaintiff's tenure would be inappropriate under the circumstances since plaintiff was then an alien and accordingly could not hold a permanent faculty position with the Univer-

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1. Chapter IV of the University of Tennessee Faculty Handbook (1962), in effect at the time provided under the caption, "Periodic Consideration," in part that:

> "In general, all recommendations for promotion or salary adjustments within a department are initiated by the department head . . . Normally, all such recommendations are made in conjunction with the preparation of the budget."
>
> • • • • •
>
> "Final Decision
>
> "Final decision on promotions or salary adjustments within rank will be made by the Board of Trustees."

More particularly, the administrative scheme is set forth at page 18, which provides that recommendations are made by the department head to the dean of the college. Subsequent to any hearing and advisement, the dean forwards his recommendation to the Academic Vice President, who, upon concurrence submits his recommendation to the President. After Presidential action, the Board of Trustees acts on the recommendation.

sity.[2] Likewise, Professor Bradley, a tenured faculty member of the Department, who also attended the October 29 meeting stated that he was advised by Dr. Dessart that the committee could not formally vote on the question of tenure due to plaintiff's alien status.

Plaintiff testified that after the special meeting he was "congratulated" by those faculty members who had attended the meeting. Following the October 29 meeting, plaintiff received a letter from Dr. Dessart that stated it "was recommended that [he] be appointed an associate professor without tenure. . . . The question of recommending tenure will be considered by a similar departmental group at the time you become a citizen of the United States. In addition, it was recommended that you receive the full benefits of participation in TIAA/CREF at the first reasonable opportunity . . . ."

The TIAA/CREF is a financial retirement program at the University that, according to the Faculty Handbook (p. 25) at that time, was restricted to "permanent type personnel."

As Dr. Dessart's October 29 letter was not in accord with the spirit of the earlier congratulations, plaintiff sought conference with Dr. Dessart, who advised him that the law pre-

2. 49 Tenn. Code Ann. 1303 provides in part:

"It shall be **unlawful** for the trustees of the University of Tennessee . . . to employ any . . . teacher . . . to have in any way the custody and care of students of the public educational institutions of this state who is not a citizen of the United States of America; provided that nothing in this section shall be construed to prohibit arrangements whereby professors and teachers who are citizens of other nations may be employed on a temporary basis on the faculties of colleges, universities or public schools in Tennessee . . ." This state policy was effected at the faculty level at p. 15 of the faculty handbook: "Citizens of other countries may be employed in temporary positions only."

As the case under examination here is governed by the **Roth** and **Sindermann** guidelines, it is inappropriate at this time to make a dispositive finding on this statute's constitutionality.

cluded a grant of tenure but that his prospects with the University of Tennessee were good. Indeed, Dr. Dessart testified that had a vote been taken at the October 29 meeting he would have voted for granting plaintiff tenure.

Additionally, plaintiff further testified that thereafter in all other operative respects he was treated by his fellow faculty members as a tenured professor—a person with some permanency in the Department's future. In particular, plaintiff was invited and attended on two occasions the annual meetings of tenured faculty, where he was afforded the opportunity to participate in the discussions and vote on the tenure status of other mathematics professors.

Satisfied with his conversation with Dr. Dessart and the assurances of his fellow faculty members, together with other evidence of his permanency in the University community, plaintiff and his wife purchased a home in the Knoxville area. He continued to teach in the Department of Mathematics for the school years 1969-1970, 1970-1971, and 1971-1972. On December 15, 1971 he became a citizen of the United States. On March 8, 1973 plaintiff was summarily notified by letter that his appointment as an Associate Professor would be terminated as of August 31, 1973. Plaintiff was not afforded a hearing by any departmental or administrative committee, but was only advised in the termination letter that his performance as a teacher was not "of the quality we expect of our tenured staff." Plaintiff sought recourse through the appropriate administrative procedures, but, to date, has not been granted a due process hearing.

Against this factual background, the Court concludes that under ***Roth*** and ***Perry***, there existed sufficient objective evidence to vest in plaintiff a cognizable property interest in the form of a reasonable expectation of future and continued employment. Defendant objectively acted toward plaintiff in such a manner as to reasonably lead him to believe that

he was a person with a relative degree of permanency in the academic community of this University. Upon acquiring this property interest, it cannot be terminated without procedural due process.

The Court is mindful and appreciative of the guidelines set forth in *Roth* and *Perry* and the posture in which the Court made its rulings. Thus, it is generally accepted that a mere subjective expectancy of continued re-employment by a non-tenured teacher is not an interest protected. Rather, there is necessarily precedent to such a property interest a finding by the court that there exist sufficiently objective indicia to lead a non-tenured teacher to reasonably believe a degree of stability had attached itself to his position. Under *Perry*, it is the responsibility of the Court to analyze the totality of circumstances surrounding the teacher's employment to determine whether the formal conduct of those around him provide a sufficient basis of objective expectancy of future employment. In seeking to define this property interest, the Supreme Court emphasized in *Perry* that traditional notions of property do not require rigid and formalistic tests. Rather, it recognized that the absence of tenure did not preclude a finding that the teacher has a "property" interest in re-employment if the acts and conduct of all the parties concerned lead to a mutually explicit understanding. 408 U.S. at 601.

> "A teacher, like the respondent, who has held his position for a number of years, might be able to show from the circumstances of this service—and from other relevant facts—that he has a legitimate claim of entitlement to job tenure. Just as this Court has found there to be a 'common law of a particular industry or of a particular plant' that may supplement a collective-bargaining agreement (citation), so there may be an unwritten 'common law' in a particular university that certain employees shall have the equivalent of tenure."

408 U.S. at 602, 92 S. Ct. at 2700, 33 L. Ed. 2d at 580.

If this Court is to eschew formalistic and technical tests in finding property interest then the mere presence of a formal tenure system, as is the case under examination here, should not be a dispositive distinction between *Perry* and the case before this Court. It is the opinion of the Court that under the circumstances here, plaintiff had a viable understanding that his employment would continue on a permanent basis with the Department of Mathematics, notwithstanding the statement contained in the October 29 correspondence that plaintiff's position was one without tenure. All the evidence and testimony received by the Court points toward a mutual understanding of job permanency.

While the issues of the constitutionality of the Tennessee statute restricting tenure to United States citizens is not before the Court, plaintiff could have reasonably concluded that "but for" the statute's presence he would have been granted tenure in 1968. Additionally, plaintiff was treated as a tenured faculty member and such objective manifestations served as a reasonable basis for a mutual understanding between plaintiff and the University.

Remaining, therefore, is the appropriate relief for plaintiff. In *Perry* the Court submitted that "[p]roof of such a property interest would not, of course, entitle him to reinstatement. But such proof would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency." 408 U.S. at 603. However, due process, an inherently illusive concept, requires the adoption of different procedures at different times. Plaintiff here should be afforded a statement of the charges against

him, the names of witnesses who will appear on behalf of the University and the nature of their expected testimony, an opportunity for plaintiff to appear with an attorney, at a hearing before an appropriate tribunal that possesses some academic expertise, and answer and confront charges against him. It should be emphasized, however, that a fair and adequate hearing need not be conducted in a trial-like atmosphere.

As plaintiff's termination under the March 8 letter was without minimal due process and, therefore, wrongful, plaintiff is entitled to back pay from August 31, 1973 until the University completes a hearing complying with the above requirements. Davis v. Barr, 373 F. Supp. 740 (E.D. Tenn. 1973); Zimmerer v. Spencer, 485 F.2d 176 (5th Cir. 1973).

As noted in ***Perry***, the relationship between "a state institution and one of its teachers is essentially a matter of state concern and state law."[3] This Court does not sit in review of University procedures and in this opinion does not reflect either on the merits of plaintiff's capabilities and methodology as a teacher or the basis of the Department's non-retention of plaintiff. See generally, Lukac v. Acocks, 466 F.2d 577 (6th Cir. 1972); Hetrick v. Martin, 480 F.2d 705 (6th Cir. 1973); Harp v. Clemens, 464 F.2d 1029 (6th Cir. 1972); Poddar v. Youngstown State Univ., 480 F.2d 192 (6th Cir. 1973).

In conclusion, the parties will proceed in compliance with this memorandum and it is ordered that plaintiff receive all back pay from August 31, 1973 until the completion of an appropriate hearing.

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3. 408 U.S. at 593 (C. J. Burger, concurring).

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DR. RAJ P. SONI,
Plaintiff-Appellee,

v.

BOARD OF TRUSTEES OF THE UNIVERSITY OF TENNESSEE, ET AL.,
Defendants-Appellants.

NO. 74-1602

March 12, 1975

Before PHILLIPS, Chief Judge, EDWARDS, Circuit Judge, and O'SULLIVAN, Senior Circuit Judge.

PHILLIPS Chief Judge.

Dr. Raj P. Soni, a mathematics professor at the University of Tennessee, filed a complaint in the District Court alleging that he was denied procedural due process when the University failed to renew his teaching contract without giving him adequate notice or a hearing. District Judge Robert L. Taylor, sitting without a jury, held that Dr. Soni was entitled to a due process hearing and to back pay from the date of contract termination until the University provided such a hearing. Judge Taylor's opinion is reported at 376 F.Supp. 289 (E.D. Tenn. 1974). The University appeals. We affirm.

Jurisdiction is invoked under 28 U.S.C. §§ 1331 and 1343(3).

Dr. Soni was born and reared in India. He attended an Indian university from which he received a Bachelor of Arts degree and a Master of Arts degree in mathematics. For several years Dr. Soni taught mathematics at the college level in India, and in 1959 he came to the United States to obtain his Ph.D. degree in mathematics from Oregon State University, which he received in 1963.

In September 1967, Dr. Soni joined the Mathematics Department of the University of Tennessee as a Visiting Associate Professor. At this time, Dr. Soni's teaching experience at the college level included six years as an instructor in India and one year as an Associate Professor at Oregon State University.

On several occasions during the 1967-1968 school year, Dr. Soni discussed with the then head of the Department of Mathematics, Professor John H. Barrett, the question of his being granted a permanent position at the University. At that time Dr. Soni was concerned about the permanency of his job status with the University and was interested in having a decision made one way or the other. As a result of these discussions, it was agreed between Dr. Soni and Professor Barrett that his visiting appointment would be extended for the 1968-1969 school year, and that a decision about a permanent appointment would be made in the fall of 1968.

On October 3, 1968, Professor Barrett issued "A recommendation for consideration by Professors and Associate Professors (with tenure)" regarding Dr. Soni and his wife, Mrs. Kusum Soni:

I recommend that Professor Raj Soni be offered an Associate Professorship with tenure.

. . . . .

Shortly after he arrived, he and I agreed that a two-year visiting position would be appropriate and that during this time we would consider him for a permanent position.

. . . . .

Since it is not possible for two people in the same family to have tenure in the same department, there is no question of tenure for Mrs. Soni. However, I recommend that we express our intention to keep her on the staff permanently.

Later that month Dr. Donald J. Dessart, who was appointed Acting Head of the Department of Mathematics when Professor Barrett became ill, called a special meeting of the Department's tenured faculty solely to consider approving Dr. Soni for a permanent appointment. At the meeting on October 29, 1968, Professor Dessart summarized the contents of Professor Barrett's memorandum recommending tenure for Dr. Soni. During the ensuing discussion, Professor Dessart pointed out that Dr. Soni was not a citizen of the United States and, consequently, could not be appointed formally to a permanent position in view of a University regulation and a state law, T.C.A. § 49-1303, quoted in footnote 1, providing that although aliens could be appointed to temporary positions at the University, they could not receive permanent appointments.

Because of the state law, the University regulation, and Dr. Soni's foreign citizenship, no formal vote was taken at the meeting on appointing Dr. Soni to a permanent faculty position with the University. Instead, Dr. Soni was changed

from a Visiting Associate Professor to an Associate Professor for the 1969-1970 school year. Immediately following the special meeting, Dr. Soni was congratulated by those faculty members who had attended and was assured by his colleagues that the action taken at the meeting had been favorable.

Shortly thereafter, Dr. Soni received a letter dated October 29 from Professor Dessart stating in part as follows:

> [I]t was recommended that you be appointed an associate professor without tenure . . . . The question of recommending tenure will be considered by a similar departmental group at the time you become a citizen of the United States. In addition, it was recommended that you receive the full benefits of participation in TIAA/CREF at the first feasible opportunity . . . .

The TIAA/CREF is a financial retirement program at the University that was restricted at that time to "permanent type personnel."

In contrast to the congratulations of his colleagues, the October 29 letter seemed unfavorable and indefinite to Dr. Soni, and accordingly he sought out Professor Dessart for an explanation. Professor Dessart informed Dr. Soni that state law prohibited a grant of tenure to aliens, but he also gave assurances that the meeting in fact had been favorable, that the faculty wanted Dr. Soni to stay at the University, and that Dr. Soni's prospects with the University were good. According to Dr. Soni, he also was told that he would be treated like any other tenured professor.

Satisfied that his nontenured status was a matter of form necessitated by a technical state law, Dr. Soni purchased a home in the Knoxville area and stopped looking for employment elsewhere. He continued teaching at the University through the 1971-1972 school year, and on December 15, 1971, he became a naturalized United States citizen. During this time Dr. Soni was given no reason to believe that he was not a permanent member of the faculty. As stated above, Dr. Soni was permitted to participate in the University retirement program, which was ordinarily available only to permanent personnel. He attended departmental meetings and voted on tenure for other teachers, and he received further verbal assurances from his colleagues.

On March 8, 1972, however, Dr. Soni was notified that his appointment would be terminated as of August 31, 1973, because his performance as a teacher and as a research mathematician had "not been of the quality we expect of our tenured staff."

He was never granted a due process hearing as provided by the University's tenure policy. This policy statement is made Appendix A to this opinion.

1) Reasonable Expectation of Continued Employment

Judge Taylor found as a fact that despite Dr. Soni's awareness of the disqualifying statute,[1] "there existed sufficient objective evidence to vest in plaintiff a cogni-

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1. This statute, T.C.A. § 49-1303, provides in part as follows:

> **49-1303. Aliens as teachers — Advocating overthrow of government.** — It shall be unlawful for the trustees of the University of Tennessee, the state board of education, or any local board of education, or any other person to employ any superintendent, principal, teacher, tutor, supervisor, or other person to have in any way the custody and care of students of the public educational institutions of this state who is not a citizen of

(Continued on following page)

zable property interest in the form of a reasonable expectation of future and continued employment," 376 F.Supp. at 292, within the meaning of Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), and Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972).

The District Court further held that the University "objectively acted toward plaintiff in such a manner as to reasonably lead him to believe that he was a person with a relative degree of permanency in the academic community of this University. Upon acquiring this property interest, it cannot be terminated without procedural due process." 376 F.Supp. at 292.

On the record before us, these findings cannot be held clearly erroneous, but to the contrary are supported by substantial evidence. Based on his findings, Judge Taylor correctly concluded that Dr. Soni's employment could not be terminated without notice and a hearing before an appropriate tribunal.

Appellants contend, however, that Dr. Soni could not have acquired a reasonable expectation of continued employment because the University of Tennessee had a well-

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(Continued from preceding page)

> the United States of America; provided that nothing in this section shall be construed to prohibit arrangements whereby professors and teachers who are citizens of other nations may be employed on a temporary basis on the faculties of colleges, universities or public schools in Tennessee.

The District Court did not pass on the constitutionality of this statute, and the issue is not before us now. We simply note that the validity of § 49-1303 is open to question. See Sugarman v. Dougall, 413 U.S. 634, 93 S.Ct. 2842, 37 L.Ed.2d 853 (1973); In re Griffiths, 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed.2d 910 (1973).

established tenure system that would have prevented any expectancy from arising in a professor who had not been granted formal tenured status. We do not find this argument convincing. The Supreme Court has stated that a legitimate expectancy of continued employment "is particularly likely in a college or university . . . that has no explicit tenure system even for senior members of its faculty, but that nonetheless may have created such a system in practice." Perry v. Sindermann, 408 U.S. 593, 602, 92 S.Ct. 2694, 2700 (1972). The Court did not say, as it easily could have, that a reasonable expectancy can not arise in the context of a formal tenure system. The existence of such a system is but one factor for the trial court to consider in analyzing the due process claim of a formally nontenured professor.

In this case, we believe that Judge Taylor properly considered all of the circumstances of the employment relationship and correctly concluded that Dr. Soni "had a viable understanding that his employment would continue on a permanent basis with the Department of Mathematics, notwithstanding the statement contained in the October 29 correspondence that [Dr. Soni's] position was one without tenure." 376 F.Supp. at 292.

2) Award of Back Pay

Judge Taylor held that Dr. Soni is entitled to back pay from August 31, 1973 until the University completes a due process hearing meeting the requirements set forth in his opinion. 376 F.Supp. at 293. The University contends that this award violates the eleventh amendment and must be reversed under Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).

The eleventh amendment, which has remained unchanged since its ratification was announced formally to the Congress in 1798, provides as follows:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

Thus we are faced with the threshold question of whether this action against the University of Tennessee is a suit against the State within the meaning of the amendment. It is well established that even though a state is not named a party to an action, the eleventh amendment still may bar the action if it seeks "to impose a liability which must be paid from public funds in the state treasury . . . ." Edelman v. Jordan, 415 U.S. 651, 663, 94 S.Ct. 1347 (1974).

The educational institution now known as the University of Tennessee was incorporated by the General Assembly of Tennessee by Chapter 64 of the Acts of 1807 (Scott's Revision, Vol. 1, 1047 (1820)).[2] The original charter provides that "The said trustees and their successors by the name aforesaid, may sue and be sued, plead and be impleaded, in any court of law or equity in this State or elsewhere."

The University is managed and controlled by the Board of Trustees, whose members include the Governor, the Commissioners of Agriculture and of Education, the President of the University, the Executive Director of the Higher Education Commission, and seventeen other members appointed by the Governor and subject to confirmation by the Tennessee Senate. T.C.A. §§ 49-3301 to -3303. The

2. This charter was amended as recently as 1971. Ch. 352, Public Acts of 1971.

Board is empowered to borrow money and to issue bonds, which do not thereby become obligations of the State of Tennessee. T.C.A. §§ 49-3501 to -3510. The University receives income from many sources in addition to the substantial annual appropriations from the Tennessee Legislature.

In University of Tennessee v. Peoples Bank, 157 Tenn. 87, 6S.W.2d 328 (1928), the Supreme Court of Tennessee held that a claim of the University was entitled to preference in a receivership proceeding for the liquidation of an insolvent bank. The Supreme Court said:

> We are of the opinion that the state, and the public represented by it, must be considered as the owner of property held by the University, and that the sovereign character of the state's ownership is not changed by the creation of the corporation as a convenient means through which the state exercises the strictly governmental function of educating the youth among its citizens. We are not able to find that the state has lost or divested itself of any element of sovereignty in the creation of this corporation which is subject to the will of the legislative branch of the state government in every particular, and the only purpose of which is to perform a governmental function. Id. at 95, 6 S.W.2d at 330.

We have been unable to find any case discussing the University's status under the eleventh amendment. There are, however, many federal cases from other circuits holding other state colleges and universities to be state instrumentalities that enjoy the protection of the eleventh amendment. *See, e.g.*, Brennan v. University of Kansas, 451 F.2d 1287, 1290 (10th Cir. 1971); Williams v. Eaton, 443 F.2d 422, 427-28 (10th Cir. 1971) (University of Wyoming); Walstad v. University of Minnesota Hosps.,

442 F.2d 634, 641-42 (8th Cir. 1971); Board of Trustees of Arkansas A & M College v. Davis, 396 F.2d 730 (8th Cir.), cert. denied, 393 U.S. 962, 89 S.Ct. 401, 21 L.Ed. 2d 375 (1968); Hamilton Mfg. Co. v. Trustees of State Colleges in Colorado, 356 F.2d 599 (10th Cir. 1966); Scott v. Board of Supervisors of Louisiana State University, 336 F.2d 557 (5th Cir. 1964); Board of Regents of the University of Nebraska v. Dawes, 370 F.Supp. 1190 (D. Neb. 1974). In addition, two district courts in this circuit have reached essentially the same conclusion. Depperman v. University of Kentucky, 371 F.Supp. 73, 77 (E.D. Ky. 1974); Huckins v. Board of Regents of University of Michigan, 263 F.Supp. 622 (E.D. Mich. 1967).

This line of authority, of course, does not control the present case. Each state university exists in a unique governmental context, and each must be considered on the basis of its own peculiar circumstances. For example, in the *Walstad* and *Scott* cases, *supra*, the state constitutions apparently contained provisions specifically extending state immunities to the universities. No such provision appears in the Tennessee Constitution. In addition, a federal district court recently scrutinized three state-related universities and concluded that they were not state instrumentalities. Samuel v. University of Pittsburgh, 375 F.Supp. 1119 (W.D. Pa. 1974), appeal dismissed for want of an appealable order, 506 F.2d 355 (3d Cir. 1974) (University of Pittsburgh, Temple University, Pennsylvania State University).

We are uncertain whether the University of Tennessee is a state instrumentality protected by the eleventh amendment. The record before us contains little data on the University's financial relationship with the State of Tennessee, and the Tennessee cases and statutory materials do not compel a conclusion one way or the other.

Assuming, without deciding, that this action is a suit against the State within the meaning of the eleventh amendment, we believe that Tennessee has waived the immunity by consenting to suits against the University of Tennessee. As noted above, the University's original charter provides that it may "sue and be sued, plead and be impleaded, in any court of law or equity in this State or elsewhere." We are not unmindful that a waiver of a constitutional right must appear clearly and may not be lightly inferred. Edelman v. Jordan, 415 U.S. 651, 673, 94 S.Ct. 1347 (1974). For example, it seems generally agreed that a state's consent to be sued in its own courts does not necessarily imply consent to be sued in federal court. *See* Williams v. Eaton, 443 F.2d 422, 428 (10th Cir. 1971); Scott v. Board of Supervisors of Louisiana State University, 336 F.2d 557, 558 (5th Cir. 1964). We are also aware that when a "public instrumentality is created with the right 'to sue and be sued' that waiver of immunity in the particular setting may be restricted to suits or proceedings of a special character in the state, not the federal courts." Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 277, 79 S.Ct. 785, 787, 3 L.Ed.2d 804 (1959); *see* Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 465-66 & n.8, 65 S.Ct. 347, 89 L.Ed. 389 (1945); Board of Regents of the University of Nebraska v. Dawes, 370 F.Supp. 1190, 1193 (D. Neb. 1974).

In this case, however, the University of Tennessee was created, only a few years after the ratification of the eleventh amendment, with the unrestricted right to sue and to be sued "in any court of law or equity." We see no indication that this sweeping consent was intended to be limited to suits brought in the state courts. To the contrary, by its terms the consent is general and purports to apply to any court and to any type of suit.

Article 1, § 17 of the Constitution of Tennessee provides that "Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct." This language originated with the State's first Constitution of 1796 and was carried forward into the Constitutions of 1834 and 1870. The Legislature of Tennessee has consented that the University may sue and be sued. The power to sue grants to the University the right to recover a money judgment. Consent to be sued inescapably subjects the University to the hazard of having a money judgment rendered against it.

We, therefore, conclude that the eleventh amendment does not bar the money judgment against the University in this case.

Accordingly, the judgment of the District Court is affirmed. The costs of this appeal are taxed against the University of Tennessee.

APPENDIX A

Tenure Policy

After the expiration of a probationary period, teachers or investigators should have permanent or continuous tenure,[1] and their services should be terminated only for

1. Granting of tenure is an expression of confidence in the integrity and worth of an individual teacher, scholar, or teacher-scholar. Tenure is a code word which may be expanded into a statement. It says something of this sort: "You have performed well and responsibly here (or elsewhere; or here and elsewhere) over a period of time. We have need for your services now and will continue to need them for many years to come. We believe that you will continue henceforward to perform well and responsibly. So that you may be free from concern over retaining your position, we guarantee that so long as you want to stay and so long as you continue to perform well and responsibly, you will have your place and will be eligible for pro-

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adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of bona fide financial necessities of the University. The precise terms and conditions of every appointment should be stated in writing and be in the possession of both institution and teacher before the appointment is consummated.

Beginning with appointment to the rank of full-time Instructor of a higher rank, the probationary period should not exceed seven years, including within this period full-time service in all institutions of higher education; but subject to the proviso that when, after a term of probationary service of more than three years in one or more institutions, a teacher is called to this institution it may be agreed in writing that his new appointment is for a probationary period of not more than four years, even though thereby the person's total probationary period in the academic profession is extended beyond the normal maximum of seven years. Notice should be given at least one year prior to the expiration of the probationary period if the teacher is not to be continued in service after the expiration of that period. During the probationary period a teacher should have the freedom and responsibility that all other members of the faculty have.

Except in cases of gross incompetency, immorality or felony, where the facts are not in dispute, termination for

(Continued from preceding page)

motions, increases in stipend, and any other rewards available to the tenure staff. We further guarantee that you are protected from the capricious exercise of administrative powers. Tenure can only guarantee the rank and salary (not always the salary if, for any reason, the University should suffer severe financial reverses) agreed upon at the time tenure is granted. And, of course under conditions described on pp. 20-22 of The Faculty Handbook, tenure insures use of proper procedures before a dismissal, but it does not insure against dismissal after proper procedures have been followed."

cause of a continuous appointment or the dismissal for cause of a teacher previous to the expiration of a term appointment whether based on charges initiated by the Trustees, administration, or members of the faculty should be considered by a committee composed of representatives of both the faculty and the administration, with the right to all parties to have a re-examination of the case by the governing board of the institution. In all cases where the facts are in dispute, the accused teacher should, prior to the hearing, be informed in writing of the charges against him and should have the opportunity to be heard in his own defense by all bodies that pass judgment upon his case. He should be permitted to have with him an adviser of his own choosing who may act as counsel. There should be a full stenographic record of the hearing available to the parties concerned. In the hearing of charges of incompetence, the testimony should include that of teachers and other scholars.

The administration may for grave cause suspend an accused faculty member pending immediate investigation and speedy hearing, or, on recommendation of the faculty and administration committee, the administration may suspend a faculty member for cause. In any case of suspension the accused faculty member should suffer no loss of salary unless he is adjudged guilty and his appointment is terminated, in which event the committee, subject to the approval of this Board, will determine the date of termination.

Administrative Procedures Relative to Tenure

1. All initial appointments shall be without *tenure* unless the letter of appointment states otherwise. Ordinarily, tenure will be considered after completion of a probationary period of not more than three years for a person in the rank

of Assistant Professor, and may be considered after one year for persons in the ranks of Associate Professor or Professor. (A full-time Instructor may be placed on tenure upon the recommendation of the department head and dean of the college and when approved in writing by the Academic Vice Chancellor. Instructors usually serve a probationary period without tenure not to exceed seven years.)

2. Proposals to bestow tenure, either at the time of a first appointment or subsequently, shall be the responsibility of those who initiate recommendations for academic promotions.

3. If tenure has not been specified in the appointment letter, the change from a non-tenure to a tenure status shall be accomplished through the processing of a Personnel Change of Status Form followed by appropriate notification from the dean of the college to the person involved.

From the Minutes of the Annual Meeting of the Board of Trustees of the University of Tennessee, Nov. 4, 1955, as revised in 1966 and in 1970.

Appendix B

No. 74-1602

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FILED
JUN 5 1975
John P. Hehman,
Clerk

DR. RAJ P. SONI,
Plaintiff-Appellee,

v.

BOARD OF TRUSTEES OF THE UNIVERSITY OF TENNESSEE, ET AL.,
Defendants-Appellants.

ORDER

Before PHILLIPS, Chief Judge, EDWARDS, Circuit Judge, and O'SULLIVAN, Senior Circuit Judge.

It is ORDERED that the opinion of the court in this case, announced March 12, 1975, be amended by inserting at the end of the first paragraph the following paragraph:

"Jurisdiction is invoked under 28 U.S.C. §§1331 and 1343(3)."

Entered by order of the court.

/s/ John P. Hehman
CLERK

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FILED
JUN 5 1975
John P. Hehman,
Clerk

DR. RAJ P. SONI,
Plaintiff-Appellee,

v.

BOARD OF TRUSTEES OF THE UNIVERSITY OF TENNESSEE, ET AL.,
Defendants-Appellants.

Before PHILLIPS, Chief Judge, EDWARDS, Circuit Judge, and O'SULLIVAN, Senior Circuit Judge.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

Entered by order of the court.

/s/ John P. Hehman
CLERK

APPENDIX D

EXCERPT FROM TRANSCRIPT OF DISTRICT COURT PROCEEDINGS

* * *

[99] MR. LEADBETTER: That is all for Dr. Matthews.

Now on Dean Nielsen, we believe that he would testify, first of all that the faculty members are not authorized to grant anyone tenure, nor is the department head.

THE COURT: That has been proven here this morning without any doubt.

MR. LEADBETTER: Okay.

THE COURT: The faculty only recommends.

MR. LEADBETTER: These are only recommendations.

That there is only one way to grant, to receive ten-

[100] ure, and that is by an approval of the higher administrative authorities of the University, and all these approvals of tenure are contained in the records, the Personnel Status Change Forms of the University. If it isn't there, they don't have tenure.

THE COURT: That's right.

* * *

TESTIMONY OF DR. DONALD J. DESSART

[DIRECT EXAMINATION]

[BY MR. LEADBETTER:]

[84] Q Then is it correct to say that a person was not required to be tenured in order to participate in meetings of the overwhelmingly tenured faculty?

A That is right.

Q Also with regard to participation in TIAA/CREF, this is back in 1968, is it your understanding that a mem-

ber of the faculty was not required to have tenure in order to participate in the retirement system?

A One does not have to have tenure in order to participate in the retirement system.

* * *

APPENDIX E

The University of Tennessee

☐ Administrative (Non-Faculty)
☒ Academic - Faculty Status
☐ Academic - Professional (Non-Fa.
☐ Clerical and Supporting

College or Division Liberal Arts Department Mathematics Date April 21, 196

Name Soni Raj P. Title Visit. Assoc. Profe[illegible] (without tenure) Title No. 2030

Base Account No. [illegible] 121052 2367

Complete items 5 & 6 when executing items 1, 2, 3, or 4.

☐ 1. TERMINATION effective ____ Reason ____
Future address and position ____

☐ 2. LEAVE OF ABSENCE effective ____ ending ____
Future address ____
Justification ____

☐ 3. TRANSFER TO NEW DEPARTMENT: ____ effective ____
With title of ____
Official work location ____

☒ 4. PROMOTION/or CHANGE IN TITLE TO Assoc. Prof. (without tenure) 2030
Effective July 1, 1969 Justification ____

☐ 5. SALARY CHANGE FROM $ ____ per month, or $ ____ per year
TO ____ per month, or $ ____ per year, effective ____
Justification ____
If part-time, indicate per cent of full-time. ____ %

☐ 6. SALARY AND BUDGET CHANGE SUMMARY: Pay charged or chargeable as follows:

Department Number	Sub-Account	Position Number	NAME OF ACCOUNT	Old Monthly Rates	New Monthly Rates	Additional Obligated or (released) Thru June 30, next
				$	$	$
			U.T. TOTALS	$	$	$

Non-University Cooperating Agency

$	$	REVISED GROSS ANNUAL RATE
$	$	$

OVER-ALL GROSS

A. Funds available in above budgets, except as follows ____

☐ 7. NAME CHANGE To ____ Revised W-4 Form attached ☐
A. Husband's Name ____ If divided charges, complete item 6.

☐ 8. MARITAL STATUS CHANGED To: Married ☐; Single ☐; Widowed ☐, Divorced ☐.

☐ 9. MEALS AND LODGING: A. Quarters ☐ Furnished: ☐ Terminated: Effective ____
B. Average number of meals per month changed from ____ to ____ Effective ____

☐ 10. OTHER CHANGES ____

Signed [illegible] Acting
Approved: [illegible]
Approved [illegible] Vice President Exec.

LAWRENCE SILVERMAN
Vice Chancellor
(Received and Recorded) 12-30-69
H. B. WHITEHEAD
Vice President Copy Director of Pl.

APPENDIX F

State of Tennessee

OFFICE OF THE
ATTORNEY GENERAL
Supreme Court Building
Nashville, Tennessee 37219

December 11, 1972

Mr. Donald L. Morton
Executive Director
Fiscal Review Committee
G-3 War Memorial Building
Nashville, Tennessee 37219

Dear Mr. Morton:

This is in response to your letter of November 6th addressed to Attorney General Pack. Our delay in answering is attributable to the fact that a conference was arranged with officials of the University of Tennessee in accordance with your suggestion.

Your initial questions relate to whether the University of Tennessee, as an agency of the State government, is immune from suit under the doctrine of sovereign immunity and whether the University is subject to the Act establishing the Board of Claims, this being Section 9-801 et seq., T.C.A. Claims arising from the University are now being considered and disposed of by the University through its insurance program.

As stated in the charter and by-laws published by the University of Tennessee Board of Trustees, Chapter 64 of the Acts of Tennessee for the year 1807 provided that the University may sue and be sued in any court of law or equity in this state or elsewhere, thus waiving sovereign immunity as the same applied to the University. However, Chapter 13 of the Acts of 1873 restored sovereign immunity to all agencies of the State Government after such immunity had been generally waived by Chapter 113 of the Acts of 1856. The pertinent language of the 1873 statute

reads as follows:

> "No court in the State of Tennessee, has, or shall hereafter have, any power, jurisdiction, or authority to entertain any suit against the State or against any officer of the State acting by authority of the State, with a view to reach the State, its treasury, funds or property . . ."

It is therefore our opinion that the University of Tennessee, as well as all other agencies of State government, are immune from suit under the provisions of Tennessee law.

The Board of Claims was established by Chapter 73 of the Acts of 1945 as amended and said Act authorized the Board to

> "pay and compensate employees of any department, division, bureau or agency of the state government, who shall receive injury in line of duty . . ."

and

> "to hear and determine all claims against the state for personal injuries or property damage caused by negligence in the construction and/or maintenance of state highways or other state buildings and properties and/or by negligence of state officials or employees of all departments or divisions in the operation of state-owned motor vehicles or other state-owned equipment while in the line of duty . . ."

It would appear to us that the language of this statute is sufficient to embrace all facets of State government, including higher educational institutions. There can be no question but that the University of Tennessee is directly responsible to the General Assembly and that all property held by it is the property of the State. This position has been sustained by decisions subsequent

to *University of Tennessee v. Peoples Bank*, 157 Tenn. 87 (1928), but the holding of the Tennessee Supreme Court is most clearly stated therein:

> "We are of the opinion that the state, and the people represented by it, must be considered as the owner of property held by the university, and that the sovereign character of the state's ownership is not changed by the creation of the corporation as a convenient means through which the state exercises the strictly governmental function of educating the youth among its citizens. We are not able to find that the state has lost or divested itself of any element of sovereignty in the creation of this corporation, which is subject to the will of the legislative branch of the state government in every particular and

the only purpose of which is to perform a governmental function."

It is therefore our opinion that the University is subject to the provisions of Section 9-801 et seq.

Your inquiry relates in part to the interpretation of Section 9 of Chapter 867 of the Public Acts of 1972, the same being the General Appropriations Bill. The subject section reads as follows:

"The provisions of this section shall apply equally to higher educational institutions, which shall likewise be subject to the provisions of law in the same manner as other agencies of the state as they relate to being subject to the requirements, restrictions and controls of the State Board of Claims and the State Building Commission."

As stated above, it appears that the University of Tennessee has not been legislatively excluded from the provisions of the Board of Claims Act and that Section 9 would, if anything, merely reaffirm the existing provisions of law for the fiscal year 1972-73. It is, of course, possible that the University would be upheld in its contention that its unique structure exempts it from the Board of Claims Act, and for this reason the contingent effect of Section 9 should be considered.

Mr. Morton -4- December 11, 1972

It is our opinion that, standing alone, Section 9 of Chapter 867 of the Public Acts of 1972 is sufficient to subject the University to the provisions of the Board of Claims Act for the period that the current General Appropriations Bill is in effect. The language of Section 9 specifically relates to higher educational institutions and no exception is made

in the case of the University. It has been suggested that the University would not be so subject because Section 9 is made applicable only to agencies of the State "as they [now] relate to being subject . . . to the State Board of Claims," and that the University is not now so subject. It is our opinion that the language of the Act should be otherwise construed and that it is meant to say that all higher educational institutions shall be subject to the Board of Claims just as other agencies of the State are now so subject. The question has also been raised as to whether the caption of the appropriations bill is sufficiently broad to embrace the provisions of Section 9. It appears to us that the caption is sufficiently broad because the intent stated therein "to make appropriations for the purpose of defraying the expenses of the state government for the fiscal year beginning July 1, 1972" is conditioned as follows: "and to establish certain provisions, limitations and restrictions under which appropriations may be obligated and expended." Section 9 constitutes such a limitation and restriction.

It is our opinion that Section 9-801 et seq., T.C.A. is sufficient to embrace the University of Tennessee and all other agencies of state government and to place all claims arising from its activities under the jurisdiction of the State Board of Claims. It is also our opinion that Section 9 of Chapter 867 of the Public Acts of 1972 expressly reaffirms the jurisdiction of the Board over claims arising from the University for the fiscal year 1972-73.

We realize that compliance with the Board of Claims Act will require substantial changes in the administrative practices of the University, but the legality and constitutionality of legislative acts cannot be predicated upon the practical results that

may ensue from their enactment. Such objections are properly raised and determined only in the General Assembly. It appears to us that the University is clearly subject to the jurisdiction of the Board of Claims, and that a position to the contrary is not supported by any persuasive authority.

Yours very truly,

/s/ W. L. Barry
William L. Barry
Assistant Attorney General

WLB/rc

cc - Mr. John Baugh
Executive Secretary
University of Tennessee Board of Trustees

Mr. James Drinnon
Legal Counsel
University of Tennessee

Supreme Court, U. S.
FILED
AUG 26 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-1581

BOARD OF TRUSTEES OF THE UNIVERSITY OF TENNESSEE and EDWARD J. BOLING,
Petitioners,

v.

DR. RAJ P. SONI,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR DR. RAJ P. SONI IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI FILED BY THE BOARD OF TRUSTEES OF THE UNIVERSITY OF TENNESSEE AND EDWARD J. BOLING

BERNARD E. BERNSTEIN
CHARLES D. SUSANO, JR.
L. CAESAR STAIR, III
1200 Hamilton National Bank Bldg.,
Knoxville, Tennessee 37902
Telephone: 615-546-8030

Attorneys for Respondent

Of Counsel
BERNSTEIN, DOUGHERTY & SUSANO

TENNESSEE LAW PRINTERS, P. O. Box 277, Knoxville, Tennessee, Phone 525-4202

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. _____

BOARD OF TRUSTEES OF THE UNIVERSITY
OF TENNESSEE and EDWARD J. BOLING,
Petitioners,

v.

DR. RAJ P. SONI,
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On Petition for a Writ of Certiorari to
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BRIEF FOR DR. RAJ P. SONI IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI FILED BY THE BOARD OF TRUSTEES OF THE UNIVERSITY OF TENNESSEE AND EDWARD J. BOLING

OPINIONS OF COURTS BELOW

The Memorandum Opinion of the Honorable Robert L. Taylor, Judge, United States District Court for the Eastern District of Tennessee, Northern Division, dated February 21, 1974, is reported at 376 F. Supp. 289 and is reproduced in the Appendix attached to the Petition of the

Board of Trustees of The University of Tennessee and Edward J. Boling (hereinafter referred to as The University of Tennessee) (A. 20).

The Opinion of the Honorable Henry J. Phillips, Chief Judge, United States Court of Appeals for the Sixth Circuit, dated March 12, 1975, is reported at 513 F.2d 347 and is reproduced in the Appendix attached to the Petition of The University of Tennessee (A. 27).

The Order of the United States Court of Appeals for the Sixth Circuit, dated June 5, 1975, amending the Opinion of the Court announced March 12, 1975, is reproduced in the Appendix attached to the Petition of The University of Tennessee (A. 42).

The Order of the United States Court of Appeals for the Sixth Circuit, dated June 5, 1975, denying the Petition to Rehear filed by Petitioners is reproduced in the Appendix attached to the Petition of The University of Tennessee (A. 43).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on March 12, 1975. A Petition for Rehearing filed on March 25, 1975, was denied by the Court of Appeals on June 5, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The Fourteenth Amendment to the Constitution of the United States provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of

> the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Tennessee Code Annotated §49-1303 provides as follows:

> 49-1303. Aliens as teachers -- Advocating overthrow of government. -- It shall be unlawful for the trustees of the University of Tennessee, the state board of education, or any county or city board of education, or any other person to employ any superintendent, principal, teacher, tutor, supervisor, or other person to have in any way the custody and care of students of the public educational institutions of this state who is not a citizen of the United States of America; provided that nothing in this section shall be construed to prohibit arrangements whereby professors and teachers who are citizens of other nations may be employed on a temporary basis on the faculties of colleges, universities or public schools in Tennessee; provided, further, that no person who advocates the overthrow of the American form of government or who is a member of a political party subscribing to a political faith which advocates the overthrow of the American form of government shall be employed on either a temporary or permanent basis in any school in this state financed in whole or in part with public funds. Any person who shall violate any of the provisions of this section shall be guilty of a misdemeanor, punishable by a fine of not less than fifty dollars ($50.00) nor more than one hundred dollars ($100), and shall forfeit his office.

Apparently, pursuant to said statute, The University of Tennessee promulgated the following rule set forth in its Faculty Handbook in Chapter III, at page 15 (A. 5a):

> Citizenship. Citizens (by birth or naturalization) may be employed in positions considered to be permanent. Citizens of other countries may be employed in temporary positions only.

The University of Tennessee was incorporated by the General Assembly of Tennessee by Chapter 64 of the Acts of 1807. The original charter provides as follows:

> The said trustees and their successors by the name aforesaid, may sue and be sued, plead and be impleaded, in any court of law or equity in this state or elsewhere. Scotts Revision, Volume 1, 1047 (1820).

Tennessee Code Annotated §20-1702 provides:

> No court in the state shall have any power, jurisdiction, or authority to entertain any suit against the state, or against any officer of the state acting by authority of the state, with a view to reach the state, its treasury, funds, or property, and all such suits shall be dismissed as to the state or such officers, on motion, plea, or demurrer of the law officer of the state, or counsel employed for the state.

QUESTIONS PRESENTED

1. Did the provisions of *Tennessee Code Annotated* §49-1303 prevent Respondent, while a non-citizen of the United States, from obtaining a property interest in future and continued or permanent employment from The University of Tennessee?

2. Did the existence of a formal tenure system at The University of Tennessee preclude Respondent from obtaining de facto tenure from The University of Tennessee in a manner contrary to or inconsistent with the provisions and requirements of the formal tenure system?

3. If Respondent was not precluded from obtaining de facto tenure from The University of Tennessee in a manner contrary to and inconsistent with the provisions and requirements of the University's formal tenure system, did Respondent in fact obtain such de facto tenure?

4. Does the provision of the Charter of The University of Tennessee that the University may "sue and be sued" constitute a waiver of the University's Eleventh Amendment immunity, as a state agency, such that the property of the University is subject to divestiture through exercise of judicial power?

STATEMENT OF THE CASE

The United States Court of Appeals for the Sixth Circuit affirmed the District Court's finding of the following facts:

Respondent was born in India on June 2, 1933. He is married and has two children, ages 15 and 10. Dr. Soni graduated from Panjab University in India in 1951 with a Bachelor of Arts degree with honors in mathematics. In 1953 he received his Master of Arts degree in mathematics from the same University and began teaching as a lecturer in mathematics on the college level at D.A.V. College, Hoshiarpur. After one year at D.A.V. College, Hoshiarpur, Dr. Soni accepted a position as lecturer in mathematics in the Panjab Education Service at Government College, Muktsar. From 1954 to July, 1959, Dr. Soni taught on the college level as a lecturer in mathematics in the Panjab Education Service.

In July, 1959, Dr. Soni went to the United States to obtain his Ph.D. in mathematics from Oregon State University, which he received in June, 1963. Upon the receipt of his Ph.D., Dr. Soni accepted the position of senior associate mathematician with the IBM Corporation in Endicott, New York.

Due to the quota restrictions of the immigration laws of 1952, Dr. Soni had to wait three years before being admitted to the United States as an immigrant in April, 1966. Later that same year Dr. Soni took a leave of absence from the IBM Corporation to become a Visiting Associate Professor at Oregon State University, Corvalis, for the academic year 1966-1967. He rejoined the IBM Corporation in June, 1967.

In July, 1967, Respondent accepted a position with The University of Tennessee. By the time he resigned from the IBM Corporation in September, 1967, to join the Mathematics Department of The University of Tennessee as a Visiting Associate Professor, Dr. Soni's full-time teaching experience on the college level included six years as an instructor in India and one year as an Associate Professor at Oregon State University.

At the time Respondent accepted employment at The University of Tennessee as a Visiting Associate Professor, the University was in need of mathematics professors as were other universities. More mathematics positions were available than there were mathematic professors to fill them. In response to its own increase in demand, The University of Tennessee hired approximately twelve (12) math teachers for the school year 1967-1968 and the following year hired six more math teachers for the academic year 1968-1969. Mathematics professors were in demand, and, consequently, employment opportunities

were plentiful. By 1972 this employment picture had completely reversed itself. Math positions had become scarce and math professors numerous.

During the 1967-1968 school year, Respondent discussed the question of his being granted a permanent position at the University on several occasions with the then Head of the Department of Mathematics, Professor John H. Barrett. At this time Respondent was concerned about the permanency of his job status with the University and was interested in having a decision made one way or the other. If he and his wife were not going to be retained at the University on a permanent basis, they intended to look for a position and go elsewhere. If they were going to be retained on a permanent basis, they intended to settle down, buy a home, and stay at the University.

As a result of these discussions, it was mutually agreed between Respondent and Professor Barrett that his visiting appointment would be extended for the school year September, 1968 - June, 1969, but that a decision about a permanent appointment with tenure would be made in the fall of 1968.

On October 3, 1968, the Head of the Department of Mathematics, Professor John H. Barrett, issued "A recommendation for consideration by Professors and Associate Professors (with tenure)" regarding Respondent and his wife, Kusum Soni:

> I recommend that Professor Raj Soni be offered an Associate Professorship *with tenure* . . .
>
> . . .
>
> Shortly after he arrived, he and I agreed that a two-year visiting position would be appropriate and that during this time we would consider him for a *permanent position* . . . .

> Since it is not possible for two people in the same family to have tenure in the same department, there is no question of tenure for Mrs. Soni. However, I recommend that we express our intent to keep her on the staff permanently . . . . (Emphasis added)

Pursuant to the recommendation of the Head of the Department, Dr. Donald J. Dessart, who was appointed Acting Head of the Department of Mathematics when Professor Barrett became ill, issued a memorandum to the appropriate faculty members stating that "There will be a meeting at 11:00 A.M. in my office (A124A) on Tuesday, October 29, 1968, to consider approving Professor Soni for a *permanent* appointment." (Emphasis added)

The meeting called by Dr. Dessart was a special meeting. The sole person to be discussed was Dr. Soni. The sole issue to be considered was his permanent appointment. Normally, promotions and tenure were considered by the tenured faculty of the Mathematics Department at an annual meeting held around the first of the year.

Prior to the October 29 meeting, Dr. Dessart wrote out several lists pertaining to the meeting. On a copy of the notice he had sent out, he listed four agenda items as follows:

(1) Read "John's" letter.
(2) Discuss page 15 of Faculty Handbook.
(3) Professor Soni desires some positive assurance, as he would either like to buy a home, look for a new job, make plans early.
(4) If he were eligible for permanent appointment at this time, this group would recommend that he be given tenure. To demonstrate our good faith we recommend that he be approved for TIAA/CREF retroactive to September, 1968 if that can be arranged.

On another piece of paper he listed four options he thought the faculty had in considering Dr. Soni's status:

1. terminate visiting appointment without an offer for renewal.
2. offer another one-year appointment.
3. offer one-year appointments with an informal understanding of automatic renewal until he becomes a citizen.
4. offer one-year appointment with an informal understanding of automatic renewal with the recommendation to a future body that he be granted tenure.

On still another list Dr. Dessart listed the following five agenda items:

1. Quote from John's letter.
2. Discuss U. S. citizenship question.
3. However, he does want some assurance.
4. Discuss options and discussions with John Baugh - Legal Counsel.
5. Other assurance - verbal from colleagues
   - TIAA/CREF

On October 29, 1968, the meeting of the tenured faculty called by Professor Dessart was held in his office. During the meeting Professor Dessart summarized the contents of the memorandum from the Head of the Mathematics Department, Dr. Barrett, recommending that Dr. Soni be offered an Associate Professorship with tenure. A general discussion of Dr. Soni followed. During the discussion, Dr. Dessart pointed out that Dr. Soni was not a citizen of the United States and, consequently, could not be

appointed formally to a permanent position at the University in light of a requirement of state law, and a University regulation, that, while aliens could be appointed to temporary positions at the University, they could not receive permanent appointments. Nevertheless, Dr. Dessart pointed out that Dr. Soni wanted some decision from the faculty on the permanency of his job status. It was made clear that Dr. Soni wanted some assurances from the Department and that he was concerned about his future at the University in regard to whether he should purchase a home in the University community.

Solely because of the state law, the University regulation, and Dr. Soni's lack of citizenship, no formal vote was taken at the meeting on appointing Dr. Soni to a permanent faculty position with the University. Instead, Dr. Soni was changed from a Visiting Associate Professor to an Associate Professor for the school year 1969-1970, but there was a general understanding that Dr. Soni would be thought of as filling a permanent position in the Mathematics Department, though such a position could not be officially formalized.

After the special meeting, Dr. Soni was congratulated by those faculty members who had attended the meeting and was assured by his colleagues that the action of the tenured faculty had been favorable.

Following the October 29 meeting, Dr. Soni received a letter from Dr. Dessart stating "it was recommended that you be appointed an associate professor without tenure . . . The question of recommending tenure will be considered by a similar departmental group at the time you become a citizen of the United States. In addition, it was recommended that you receive the full benefits of participation in TIAA/CREF at the first reasonable opportunity . . ."

The TIAA/CREF is a financial retirement program at the University that, at that time, was restricted to "permanent type personnel."

Since Dr. Dessart's letter of October 29 was not in accord with the spirit of the earlier congratulations, Dr. Soni immediately sought out Dr. Dessart to obtain an explanation. When he met with Dr. Dessart, Dr. Soni was assured by him that the meeting had indeed been favorable but that his official grant of tenure could not be formally announced until he became an American citizen because of the requirement of State law and the University regulation. Dr. Dessart, however, assured Dr. Soni that he would be treated as a tenured professor in all respects and afforded all the rights and privileges of tenure.

Dr. Dessart testified, as did the only other two witnesses, that had a vote been taken at the October 29 meeting, he would have voted for granting Dr. Soni tenure. In fact, Dr. Dessart stated that he wanted Dr. Soni to stay at the University and thought very favorably of him.

On October 30, 1968, Dr. Dessart also wrote a letter to Mrs. Kusum Soni that was identical to the letter he had sent Dr. Soni except that the recommendation was for "an assistant professor without tenure" and the reference to TIAA/CREF benefits was omitted.

Thereafter, in all other operative respects Dr. Soni was treated by his fellow faculty members as a tenured professor—a person with some permanency in the Department's future. In particular, Dr. Soni was invited and attended the annual meetings of the tenured faculty, where he was afforded the opportunity to participate in the discussions, make observations, and vote on the promotion and tenure status of other members of the faculty of the Department of Mathematics. In addition, he partici-

pated in the retirement program (TIAA/CREF) at the University as a permanent employee.

Satisfied with his conversation with Dr. Dessart and the assurances of his fellow faculty members, together with other evidence of his permanency in the University community, Dr. Soni and his wife purchased a home in the Knoxville area and ceased looking for employment at other universities. Dr. Soni had no reason to be alarmed by the lack of official notice of his tenure because of the assurances he received and because there were other permanent members of the Mathematics Department faculty who considered themselves tenured on being promoted to the rank of Associate Professor, but who were not officially notified of their tenure until quite some time thereafter. If Dr. Soni had not been assured of the permanency of his position at the University, he would not have purchased a home in Knoxville and would have immediately sought employment elsewhere at a time when associate professors in mathematics were in demand.

Subsequently, Dr. Soni continued to teach in the Department of Mathematics for the school years 1969-1970, 1970-1971, and 1971-1972. During this time Respondent was given no reason to believe that he was not a permanent member of the faculty. On December 15, 1971, he became a citizen of the United States. On March 8, 1972, he was summarily notified by letter that his appointment as an Associate Professor would be terminated as of August 31, 1973. Dr. Soni was not afforded a hearing by any departmental or administrative committee, but was only advised in the termination letter that his performance as a teacher was not "of the quality we expect of our tenured staff". Dr. Soni sought recourse through the appropriate administrative procedures, but the decision to terminate him was made final by the Board of Trustees on June 21, 1973.

On August 29, 1973, Respondent filed his Complaint in the United States District Court for the Eastern District of Tennessee, Northern Division, against Petitioners alleging that The University of Tennessee, through its agents, acted unlawfully and contrary to the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment to the Constitution of the United States by:

(a) discriminatorily classifying the plaintiff according to his alienage;

(b) terminating the plaintiff's employment with the University in a manner different from the procedures applicable to tenured faculty members;

(c) treating the plaintiff differently from other similarly situated faculty members with at least seven years of service as full-time instructors on the college level; and

(d) depriving the plaintiff of his property right of an expectancy of continued employment at the University without due process of law.

Respondent sought a judgment declaring that Petitioners had violated the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment as set out above and for a preliminary and permanent injunction restraining Petitioners from terminating Respondent's employment with the University as of August 31, 1973, or directing the reinstatement of Respondent as of August 31, 1973, in the event that Respondent had been terminated at the time of the hearing of this cause.

On February 21, 1974, the Honorable Robert L. Taylor, Judge, United States District Court for the Eastern District of Tennessee, Northern Division, issued a Memorandum Opinion and Order in which he concluded that in light of

the factual background presented to the Court there vested in Respondent a cognizable property interest in the form of a reasonable expectation of future and continued employment that could not be terminated without procedural due process; that Respondent's termination by the University was without minimal due process and, therefore, wrongful; and that Respondent was thus entitled to back pay from August 31, 1973, until the University completed a hearing complying with the requirements set forth in said Memorandum Opinion and Order.

On March 12, 1975, the United States Court of Appeals for the Sixth Circuit affirmed the judgment and findings of the District Court.

On June 5, 1975, the Court of Appeals denied the Petition to Rehear filed by Petitioners.

ARGUMENT

QUESTION 1

DID THE PROVISIONS OF TENNESSEE CODE ANNOTATED §49-1303 PREVENT RESPONDENT, WHILE A NON-CITIZEN OF THE UNITED STATES, FROM OBTAINING A PROPERTY INTEREST IN FUTURE AND CONTINUED OR PERMANENT EMPLOYMENT FROM THE UNIVERSITY OF TENNESSEE?

Tennessee Code Annotated §49-1303 did not prevent Respondent from obtaining a property interest and/or a reasonable expectation of future and continued or permanent employment from The University of Tennessee.

Unconstitutionality of State Statute

Any consideration of *Tennessee Code Annotated* §49-1303, and the University regulation adopted pursuant thereto, is

tainted by the fact that the law prohibiting permanent employment of aliens is blatantly unconstitutional on its face as a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Sugarman v. Dougall*, 413 U.S. 634 (1973); *In re Griffiths*, 413 U.S. 717 (1973); *Graham v. Richardson*, 403 U.S. 365 (1971); *Mohamed v. Parks*, 352 F. Supp. 418 (D. Mass. 1973); *Younus v. Shabat*, 336 F. Supp. 1137 (N.D. Ill. 1971).

The Fourteenth Amendment to the Constitution is not confined to the protection of citizens but protects resident aliens as well. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). The Equal Protection Clause is also applicable to the employment conditions of teachers in public colleges. *Rainey v. Jackson State College*, 435 F.2d 1031 (5th Cir. 1970); *Trister v. University of Mississippi*, 420 F.2d 499 (5th Cir. 1969).

Classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. *Graham v. Richardson*, 403 U.S. 365 (1971). Such classifications carry no presumption of validity and must be narrowly tailored to fit a substantial and compelling state interest. *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948).

The arbitrariness and discriminatory nature of *Tennessee Code Annotated* §49-1303 is manifested in the very words of the statute. Aliens are excluded from permanent employment but are permitted employment on a temporary basis. If an alien is so qualified as to be trusted with the care and supervision and teaching of students on a temporary basis, should not the same alien be qualified to be entrusted with the same responsibilities on a permanent basis?

At the time Respondent was considered for a permanent appointment in 1968, he was subjected to a separate category of treatment by virtue of *Tennessee Code Annotated* §49-1303 solely on the basis of his status as an alien. Respondent's lack of citizenship was the only reason no vote was taken at the October 1968 meeting to officially grant him tenure at the University. Respondent was deprived of the guarantees of the Equal Protection Clause of the Fourteenth Amendment for the sole reason that he was an alien, and the denial of an official grant of tenure at that time imposed upon him a burden inconsistent with his right to the equal protection of the laws.

It is thus the position of Respondent that *Tennessee Code Annotated* §49-1303 is unconstitutional and that an unconstitutional statute did not, and should not, prevent Respondent from obtaining a property interest in future and continued employment from The University of Tennessee. In fact, it is solely because of this unconstitutional statute that this entire problem arose. If there had been no such statute in existence in 1968 and aliens had been treated similar to citizens by The University of Tennessee, Respondent would have been granted official tenure, and the entire question of whether he obtained a property interest in future and continued employment would never have arisen.

Validity of Tennessee Supreme Court Decision

Petitioners cite the case of *State ex rel. Angle v. City of Knoxville*, 176 S.W.2d 801 (1944), for the proposition that the Tennessee Supreme Court has held that non-citizens have no rights as teachers. Petitioners argue that this 1944 decision, coupled with §49-1303, presents a conflict with the Opinions of the District Court and the United States Court of Appeals for the Sixth Circuit that warrants resolution by this Court.

Respondent contends that this Court has already resolved any such alleged conflict in favor of the District Court and Court of Appeals by its decisions in *Sugarman* and *In re Griffiths*. The Court of Appeals recognized that these two cases by implication rendered the Tennessee statute void and unconstitutional. (A. 31-32, n. 1). By the same token, these two cases also overrule by implication any Tennessee Supreme Court decision to the contrary.

The only reason the District Court and the Court of Appeals did not specifically rule §49-1303 unconstitutional was because they recognized that this issue was not directly before the Court. The only issue to be decided was whether Respondent had obtained a property interest in future and continued employment from The University of Tennessee. A statute that is unconstitutional on its face (and a state court decision pursuant to that statute) does not stand in the way of making such a determination and did not preclude Respondent from obtaining such an interest.

In addition, the Office of the Attorney General of the State of Tennessee has recognized that §49-1303 is unconstitutional and that any court decision affirming said statute would likewise be outdated and overruled.

> It is the opinion of this office that, insofar as it relates to employees in public education, TCA §49-1303 is unconstitutional. (Appendix A, *infra*)

More recently, Petitioners themselves have recognized the unconstitutionality of *Tennessee Code Annotated* §49-1303 and the appropriateness of treating all persons equally in awarding tenure. On June 19, 1975, the Knoxville News-Sentinel reported that The University of Tennessee had granted tenure to nine aliens (Appendix B, *infra*). This action nullifies Petitioners' argument that there is a conflict that should be resolved by this Court as to whether

Tennessee Code Annotated §49-1303 prevents a non-citizen from obtaining a property interest and/or a reasonable expectation of future and continued or permanent employment from The University of Tennessee.

Petitioners also now contend that a resolution of this alleged conflict is of critical importance to the University. This argument overlooks the fact that the decisions of the District Court and Court of Appeals are based on the guidelines set forth in *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sinderman*, 408 U.S. 593 (1972), that Respondent had obtained a property interest. Petitioners' fear that every alien excluded by §49-1303 will now claim such a property interest is thus unwarranted. If any such claims are made, their success or failure will depend on whether that particular case and fact situation meets the guidelines, standards and requirements set forth in the *Roth* and *Perry* cases.

QUESTION 2

DID THE EXISTENCE OF A FORMAL TENURE SYSTEM AT THE UNIVERSITY OF TENNESSEE PRECLUDE RESPONDENT FROM OBTAINING DE FACTO TENURE FROM THE UNIVERSITY OF TENNESSEE IN A MANNER CONTRARY AND INCONSISTENT WITH THE PROVISIONS AND REQUIREMENTS OF THE FORMAL TENURE SYSTEM?

The existence of a formal tenure system at The University of Tennessee did not preclude Respondent from obtaining de facto tenure.

This Court in *Perry v. Sinderman*, *supra*, stated that:

> A teacher, like the respondent, who has held his position for a number of years, might be able to show from the circumstances of this service—and from other relevant facts—that he has a legitimate claim of entitlement to job tenure. Just as this court has found there to be a "common law of a particular industry or of a particular plant" that may supplement a collective-bargaining agreement (citation), so there may be an unwritten "common law" in a particular university that certain employees shall have the equivalent of tenure. This is particularly likely in a college or university . . . that has no explicit tenure system . . . but that nonetheless may have created such a system in practice. 408 U.S. at 602.

The Court of Appeals for the Sixth Circuit clearly held that the existence of a formal tenure system at The University of Tennessee did not preclude Respondent from obtaining de facto tenure.

> The Court did not say, as it easily could have, that a reasonable expectancy cannot arise in the context of a formal tenure system. The existence of such a system is but one factor for the trial court to consider in analyzing the due process claim of a formally non-tenured professor. (A. 33)

Petitioners argue that the decision of the Court of Appeals for the Eighth Circuit in *Cusumano v. Ratchford*, 507 F.2d 980 (8th Cir. 1974), is in direct conflict with the holding of the Court of Appeals for the Sixth Circuit. Petitioners base their argument on the assertion that the facts in *Cusumano* are identical to those in this case, the results in the two cases are different, and therefore there is a conflict between the two Circuits that requires a resolution by this Court.

Respondent respectfully urges that the facts of these two cases are hardly identical, that there is no conflict between the two Circuits, and that this Court has already

made it clear in its *Perry* opinion that the existence of a formal tenure system does not preclude the obtaining of de facto tenure.

It is apparent from reading the decision in *Cusumano* that the Court of Appeals for the Eighth Circuit agrees with the Court of Appeals for the Sixth Circuit that the existence of a tenure system is but one factor to consider in analyzing the due process claim of a formally non-tenured professor. In *Cusumano*, the Court of Appeals for the Eighth Circuit simply found that there were not enough factors to outweigh the existence of the formal tenure system and on which the Court could conclude that *Cusumano* had obtained a property interest in future and continued employment at The University of Missouri. To interpret the *Cusumano* decision as holding that the existence of a formal tenure system precludes the obtaining of de facto tenure is to broaden the scope of the opinion beyond its intended boundaries and to imagine words in the opinion that simply do not exist.

The cases of *Cusumano* and Respondent are totally different. There is no indication that Cusumano was an alien who was prevented by an unconstitutional statute from being a permanent employee. The only action taken by the University in *Cusumano* was the failure to give notice within the time specified by the University's regulation. Nowhere in the *Cusumano* decision are there the innumerable facts on which the District Court found in *Soni*, and the Court of Appeals affirmed, that:

> under *Roth* and *Perry*, there existed sufficient objective evidence to vest in plaintiff a cognizable property interest in the form of a reasonable expectation of future and continued employment. Defendant objectively acted toward plaintiff in such a manner as to reasonably lead

> him to believe that he was a person with a relative degree of permanency in the academic community of this University. Upon acquiring this property interest, it cannot be terminated without procedural due process.
>
> . . . .
>
> It is the opinion of the Court that under the circumstances here, plaintiff had a viable understanding that his employment would continue on a permanent basis with the Department of Mathematics, notwithstanding the statement contained in the October 29 correspondence that plaintiff's position was one without tenure. All the evidence and testimony received by the Court points toward a mutual understanding of job permanency.
>
> While the issues of the constitutionality of the Tennessee statute restricting tenure to United States citizens is not before the Court, plaintiff could have reasonably concluded that "but for" the statute's presence he would have been granted tenure in 1968. Additionally, plaintiff was treated as a tenured faculty member and such objective manifestations served as a reasonable basis for a mutual understanding between plaintiff and the University. (A. 23-25).

After reviewing some of the many facts in the *Soni* case, the Court of Appeals for the Sixth Circuit emphatically affirmed the findings of the District Court:

> On the record before us, these findings cannot be held clearly erroneous, but to the contrary are supported by substantial evidence. Based on his findings, Judge Taylor correctly concluded that Dr. Soni's employment could not be terminated without notice and a hearing before an appropriate tribunal.

Respondent thus urges that any difference between the opinion of the Court of Appeals for the Eighth Circuit in

Cusumano and the opinion of the Court of Appeals for the Sixth Circuit in *Soni* does not come as a result of any conflict between the two circuits as to the effect the existence of a formal tenure system has in analyzing the due process claim of a formally non-tenured professor. Rather, the different results reached by the two courts in these two separate opinions are a result of the two entirely different sets of facts presented in each case. Respondent respectfully contends that both circuits agree with this Court in its holding in *Perry v. Sinderman*, *supra*, that the existence of a formal tenure system does not preclude the obtaining of de facto tenure.

The University's Formal Tenure System

The existence of a formal tenure system at The University of Tennessee by itself should not preclude a consideration of the facts of this case under a *Roth* and *Perry* analysis. The evidence indicates that though the University may have had a "formal tenure system" in 1967 and 1968, this system was really neither very formal nor consistently and uniformly applied. For Petitioners to claim that the mere existence of a formal tenure system precludes Respondent from showing that he had the equivalent of tenure is to discriminate unfairly against Respondent by allowing others who also lacked formal tenure status to go unchallenged.

In stipulating the testimony of Petitioners' witness, Dr. Harry T. Matthews, the following exchange took place between the District Court and counsel for the parties [Mr. Stair for Respondent and Mr. Leadbetter for Petitioners]:

MR. STAIR: We would elicit from Dr. Matthews that he did not receive his own tenure until after he was the head of the department.

THE COURT: He would testify to that?

MR. STAIR: Yes.

MR. LEADBETTER: Well, we say he wouldn't testify—

MR. STAIR: It is your position.

THE COURT: Sir?

MR. LEADBETTER: We would indicate that—I believe that Dr. Matthews would testify that while he did not receive a letter stating that he had tenure until after this date, until after the date that he was made head, he received tenure prior to that time.

MR. STAIR: We would agree with Mr. Leadbetter entirely, that is the point. Dr. Matthews would testify that he considered himself tenured when he became an associate professor in 1967, and that he did not receive his official letter until after he was a full professor and he was head of the department, which was in either 1971 or 1972, and that was after the time he was made the head of the department on January 1, 1970.

MR. LEADBETTER: Your Honor, this is a lot of quibbling over letters. These letters—

THE COURT: I understand now what the situation is about, I understand it thoroughly, and so I think the stipulation is meaningful and I will so interpret it. (A. 105a-106a)

In addition, Dr. John Bradley, who came to The University of Tennessee in 1964 and is now a full professor, testified that he has never received any official notification of his tenure as required by the "formal tenure system" of the University. (A. 82a-83a). Furthermore, he testified that he considered the rank of associate professor as a position with tenure. (A. 83a). Even the Faculty Hand-

book stated that "Unless otherwise specified, persons with the title, rank, of Associate Professor or Professor hold these positions with tenure." (A. 83a).

These two instances thus indicate that, though the tenure system at the University may be very rigid and well defined today, as late as 1972 it was not very formal and neither uniformly applied nor regularly followed. In essence, the tenure system was observed more in the breach than in its actual application.

Equally important, these same two instances reveal the discriminatory manner in which Petitioners argue the University's tenure system should be applied. Petitioners are willing to concede that Dr. Matthews somehow obtained tenure prior to the receipt of a letter stating that he had tenure (A. 105a), but deny that Respondent could have obtained tenure in any other way than by first becoming a citizen and then receiving an official letter to that effect.

Petitioners' position is further undermined by the letter that was sent to Respondent's wife, Mrs. Soni. (Exhibit No. 7, A. 122a). The letter is dated the day after the letter to Respondent. It, too, is from the Acting Head of the Department of Mathematics, Donald J. Dessart. In fact, Dr. Dessart admitted in his testimony that it is the exact same letter he sent the day before to Respondent, except Mrs. Soni's letter did not have a reference to retirement benefits. (A. 100a-101a). In addition, the letter states that Mrs. Soni "be appointed an assistant professor without tenure . . . . The question of recommending tenure will be considered . . . at the time you become a citizen . . . ." (Exhibit No. 7, A. 122a). But Mrs. Soni could not have been considered for tenure even if she had been a citizen because, as Dr. Dessart admitted, she was only teaching part-time and part-time employees are not

eligible for tenure or TIAA/CREF retirement benefits. (A. 101a). The letter was obviously in error, but Dr. Dessart never wrote Mrs. Soni correcting it even after the error was brought to his attention. (A. 101a).

This letter to Mrs. Soni thus indicates that the letters emanating from the Head of the Department of Mathematics office were considered nothing more than "form" letters by the Head of the Department himself, and it was never intended nor expected that anyone, including Respondent, much less the University, would seek to rely on them in arguing that Dr. and Mrs. Soni did not have implied tenure or a permanent position at the University. In effect, the uncorrected, error-filled letter to Mrs. Soni rather than being proof of the application of an exclusive and rigid formal tenure system only demonstrated and confirmed that the letters were merely matters of form rather than substance. Similarly, what was supposed to have been a formal tenure system as set down in the Faculty Handbook in application, as evidenced by the case of Dr. Bradley and Dr. Matthews, was neither adhered to very rigidly nor uniformly applied.

Based on these findings, the District Court correctly concluded "If this Court is to eschew formalistic and technical tests in finding property interest then the mere presence of a formal tenure system, as is the case under examination here, should not be a dispositive distinction between *Perry* and the case before this Court." (A. 25). Similarly, the Court of Appeals for the Sixth Circuit found that Petitioners' argument that the existence of a formal tenure system precluded Respondent from obtaining de facto tenure was not convincing. (A. 33).

The "Common Law" At The University

Respondent further contends that the existence of a formal tenure system at The University of Tennessee should not preclude him from obtaining de facto tenure since, as to him, there was no tenure system. Respondent was not a citizen and was therefore automatically excluded from ever obtaining official tenure status as long as he was an alien.

Respondent contends that the faculty of the Mathematics Department at the University sensed the injustice of such a situation and found a way to circumvent it while paying homage to its technical requirements. The University needed Respondent and wanted him to stay. They thought very highly of Respondent and knew that if he was not given some assurance of the permanency of his job status, he would not stay at the University. Accordingly, Respondent was granted de facto tenure while his de jure tenure was held in abeyance until he rid himself of his alien status. In essence, then, the state law and University regulation prohibiting the granting of permanent employment to non-citizens promoted and induced the formation of a "common law" to circumvent such an obviously unconstitutional and unfair statute.

The circumstances surrounding Respondent's employment at The University of Tennessee and the fact that he was not a citizen led to the evolution of "an unwritten 'common law'" at the University which was promulgated, nurtured, and supported by the University and its agents. The essence of this common law was that Respondent would be treated as and considered in all respects a tenured member of the faculty of the Department of Mathematics despite the fact that state law precluded the formal announcement of his tenure.

Evidence of this mutual understanding and "common law" is the fact that all of the witnesses, including Petitioners' witness, Donald J. Dessart, who attended the October 29, 1968, meeting, testified that they would have voted for granting tenure to Respondent if such a vote had been allowed. (A. 85a and 98a). In addition, Dr. Dessart's handwritten notes on the notice he sent out calling the meeting clearly indicate what he considered to be the attitude of the faculty: "If he were eligible for permanent appointment at this time, this group would recommend that he be given tenure." (Exhibit No. 5, A. 114a). In light of this evidence, the District Court and Court of Appeals found that Respondent could have reasonable concluded that "'but for' the statute's presence he would have been granted tenure in 1968." (A. 25 and 33).

Such evidence thus verifies that there existed a need for a "common law" to supplement the technical rules of the University in order to insure that two associate professors of equal standing and ability in the Department of Mathematics were treated equally despite the fact that one was not a citizen. Respondent thus contends that from all of the circumstances and relevant facts there existed at the University a "common law" that entitled him to the equivalent of tenure despite the existence of a "formal" tenure system.

QUESTION 3

IF RESPONDENT WAS NOT PRECLUDED FROM OBTAINING DE FACTO TENURE FROM THE UNIVERSITY OF TENNESSEE IN A MANNER CONTRARY TO AND INCONSISTENT WITH THE PROVISIONS AND REQUIREMENTS OF THE UNIVERSITY'S FORMAL TENURE SYSTEM, DID RESPONDENT IN FACT OBTAIN SUCH DE FACTO TENURE?

Respondent contends that the District Court's finding of fact, which was affirmed by the Court of Appeals, is supported by substantial evidence. In fact, Respondent contends that the record is replete with evidence which, taken as a whole, presented a factual background against which the Court was forced to conclude that there vested in the plaintiff "a cognizable property interest in the form of a reasonable expectation of future and continued employment." (A. 23).

Initially, by virtue of the number of years Respondent taught as a full-time instructor and associate professor on the college level, Petitioners should be estopped to deny that Respondent is entitled to tenured status on the faculty. Respondent was employed at the University under five successive one-year contracts before being summarily notified of his termination by the letter dated March 8, 1972. Prior to joining The University of Tennessee, Respondent had spent one year as an associate professor at Oregon State University and six years teaching on the college level in India. It has been held that five successive one-year contracts are by themselves sufficient to create the required expectancy of re-employment that gives rise to implied tenure and a protectable property right requiring procedural due process. *Zimmerer v. Spencer*, 485 F.2d 176 (5th Cir. 1973); *Johnson v. Fraley*, 470 F.2d 179 (4th Cir. 1972); *Calloway v. Kirkland*, 334 F. Supp. 1034 (N.D.

Ga. 1971). By virtue of his length of service alone, Respondent acquired such a protectable property interest.

The evidence is uncontradicted as to the events leading up to the October 29, 1968, meeting. Shortly after Respondent joined the faculty at the University he began seeking a decision on the permanency of his job status from Dr. Barrett, who was then Head of the Department of Mathematics. (A. 44a-45a). During these discussions it was brought out that aliens could not be permanently employed at the University. But Respondent testified that the Head of the Mathematics Department had "said that notwithstanding the requirement we will make a decision and that the formality can be at your acquisition of citizenship, that the decision would be made but that the formality would be carried out as soon as you get your citizenship." (A. 57a).

Subsequently, Dr. Barrett, as the Head of the Department of Mathematics and knowing that state law prevented granting tenure to a non-citizen, recommended to the Professors and Associate Professors with tenure that Respondent be offered an Associate Professorship with tenure. (Exhibit No. 3, A. 110a). In his recommendation Dr. Barrett not only mentioned the understanding that Respondent would be considered for "a permanent position", but also recommended that "we express our intention to keep her (Mrs. Soni) on the staff permanently." (Exhibit No. 3, A. 112a). In the preceding sentence, Dr. Barrett had made it evident that he knew that Mrs. Soni was not eligible for an official permanent position since it was "not possible for two people in the same family to have tenure in the same Department." Nevertheless, his recommendation is evidence of the fact that he was as intent on insuring a permanent place on the staff for Mrs. Soni as he was for Dr. Soni, knowing all the while that neither could be granted formal tenure.

This same awareness of the law, coupled with a determination to get around it by the agents of Petitioners, is evidenced by the testimony and handwritten notes of Dr. Dessart, who became the Acting Head of the Department of Mathematics when Dr. Barrett became ill. In his notice calling the special meeting together on October 29, 1968, Dr. Dessart stated the purpose of the meeting to be to consider Dr. Soni "for a permanent appointment." (Exhibit No. 5, A. 114a). In testifying about the agenda items he wrote on one copy of the notice (Exhibit No. 5), Dr. Dessart stated:

> So we then considered the possibility of some kind of a promise of tenure, and the item that I indicated particularly in the—Item No. 4, was this attempt to set up some kind of a way that we might promise him tenure. (A. 89a).

Furthermore, in explaining the list of options he had written out, Dr. Dessart again testified that "These were possible options that I was considering at the time, to attempt some kind of a promise of tenure for Dr. Soni." (A. 90a).

The third item on Dr. Dessart's agenda states "Professor Soni desires some positive assurances, as he would either like to buy a home, look for a new job, make plans early." (Exhibit No. 5, A. 114a). Another list of Dr. Dessart's included these two items:

> 3. However, he does want some assurance
>
> . . .
>
> 5. Other assurance - verbal from colleagues
> - TIAA/CREF

These handwritten notes indicate an effort by the Acting Head of the Department to rationally list different ways to assure Respondent of his permanency without running

afoul of state law. Petitioners argue that the verbal assurances Respondent received from his colleagues are not worthy of the Court's consideration as the type of evidence warranting a finding that the plaintiff obtained a reasonable expectation of future and continued employment. Yet the Head of the Mathematics Department thought them of such significance and such persuasive power as to list them as "other assurance" to be given to Respondent.

These actions and statements by Dr. Barrett and Dr. Dessart simply indicate an effort by the Department of Mathematics to circumvent the very law on which the University now seeks to rely. It was known to both Dr. Barrett, Dr. Dessart and the other faculty members that Respondent wanted some assurance of the permanency of his job status. They, in turn, wanted to give him those assurances because they wanted him to stay at the University. The University needed him and they thought highly of him. They knew that if he were not assured of a permanent position he would seek employment elsewhere at a time when associate professors in mathematics were in demand. Thus, they did everything in their power to promise and assure him of tenure while being careful not to formalize such a grant because of the state law. Their actions and statements are proof of Respondent's contention that the policies and practices of the University towards him rose to the level of granting implied tenure.

Respondent's contention is supported by other evidence. In response to Dr. Dessart's listed suggestions, Respondent was congratulated by his colleagues following the October 29, 1968, meeting. In addition, Dr. John Bradley testified that it was his impression following the meeting that Respondent "would be considered as filling a permanent position in the Department." (A. 86a). Thus, it is easily understood why the District Court, after weighing

the conflicting testimony, found that Dr. Dessart in effect assured Respondent of his permanency at the University when Dr. Soni confronted him over his October 29 letter recommending Associate Professorship "without tenure". (A. 25).

Similarly, Petitioners contend that the TIAA/CREF retirement benefits program is not an objective indicia of the plaintiff's permanency in the academic community. Yet, Petitioner's own Head of the Mathematics Department listed it as one other way to assure Respondent of his permanency. Furthermore, Dr. Dessart testified that he wanted to make these benefits retroactive as far back as possible so that they might have their maximum persuasive impact on Respondent. (A. 104a). The District Court and the Court of Appeals thus rightfully concluded that the award of the TIAA/CREF financial retirement program to Dr. Soni was indicative of his permanency at the University.

Further evidence of the practices and policies of Petitioners that lead the District Court and Court of Appeals to conclude that there vested in Respondent a cognizable property interest was the fact that a special meeting was called for the sole purpose of considering Respondent. The tenured faculty of the Mathematics Department could have waited two months and considered Respondent's case at their annual meeting along with the other faculty members eligible for promotion and tenure that year. Instead, however, they held a special meeting to consider Respondent's tenure even after it was known by the Acting Head of the Department of Mathematics that state law prohibited the formal granting of tenure to a non-citizen. Thus, by the time the annual meeting was held in January, 1969, the tenured faculty had already acted on Respondent and he was now one of the tenured faculty members who was in-

vited, attended, and voted on the promotion and tenure of other members of the Mathematics Department. Objectively, in the space of two short months his status had been completely reversed. In October he was being considered for tenure; in January he was considering and voting on others' tenure.

In the years following the October 29, 1968, meeting, the lack of formal notice of tenure to other members of the Mathematics Department, including the Head of the Department, gave further assurance to Respondent that there was no reason for him to be alarmed by his own lack of formal tenure. Moreover, there was no reason for him to be overly concerned about the letter from Dr. Dessart. Dr. Dessart had explained it as a technicality and, after all, the same letter to Mrs. Soni had been totally in error. Since Respondent was treated just like any other tenured professor and since he attended the tenured faculty meetings and voted on the promotion and tenure of his colleagues, he, first, had no reason to think that the University would ever single him out of those who lacked formal tenure, and, second, try to terminate him, and, third, try to base that termination on a formality that they had repeatedly tried to circumvent as long as they needed and wanted Respondent to stay at the University.

Respondent contends that the many detailed facts in this case overwhelmingly compel the conclusion reached by the District Court and the Court of Appeals for the Sixth Circuit. Respondent did in fact obtain de facto tenure. The fact that a different result was reached in *Cusumano*, *supra*, does not indicate any split between the Eighth and Sixth Circuits regarding the holding and guidelines set forth in *Roth* and *Perry*. Rather, it simply points out the wide divergence and disparity in the facts between the two cases.

QUESTION 4

DOES THE PROVISION OF THE CHARTER OF THE UNIVERSITY OF TENNESSEE THAT THE UNIVERSITY MAY "SUE AND BE SUED" CONSTITUTE A WAIVER OF THE UNIVERSITY'S ELEVENTH AMENDMENT IMMUNITY, AS A STATE AGENCY, SUCH THAT THE PROPERTY OF THE UNIVERSITY IS SUBJECT TO DIVESTITURE THROUGH EXERCISE OF JUDICIAL POWER?

Respondent contends that the Eleventh Amendment does not bar the judgment awarded him against Petitioners in this case.

The District Court found that Respondent's termination by Petitioners had been without minimal due process and, therefore, wrongful. It thus ordered that Respondent receive all back pay from August 31, 1973, the date of Respondent's unlawful termination, until the completion of an appropriate due process hearing. (A. 26).

Petitioners argued in the Court of Appeals for the Sixth Circuit that this award violated the Eleventh Amendment and the decision of *Edelman v. Jordan*, 415 U.S. 651 (1974).

The Court of Appeals affirmed the District Court by holding that "the eleventh amendment does not bar the money judgment against the University in this case." (A. 38). The Court of Appeals based its decision on the fact that Tennessee had waived any immunity it might have had by consenting to suits against the University. (A. 38).

The Eleventh Amendment was ratified in 1798. In 1807 the Tennessee Legislature, in incorporating The University of Tennessee, adopted the following original charter provision:

> The said trustees and their successors by the name aforesaid, may sue and be sued, plead and be impleaded, in any court of law or equity in this State or elsewhere. Acts of Tennessee, 1807, Chapter 64, Section 1 [Scott's Revision, Vol. 1, 1047 (1820)].

Tennessee's first Constitution of 1796 and the subsequent Constitutions of 1834 and 1870 provided that "Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct." Constitution of the State of Tennessee, Article 1, §17.

The Court of Appeals thus held that the Legislature of Tennessee had consented that the trustees of the University (Petitioners) may sue and be sued and that, accordingly, Respondent was entitled to back pay from Petitioners.

In their Petition to Rehear, Petitioners argued that *Tennessee Code Annotated* §20-1702, adopted in 1873, reinstated the State's and, in turn, the University's immunity. Petitioners cited certain Tennessee decisions and a more recent opinion from the Office of the Attorney General in support of their contention. The Court of Appeals denied the Petition to Rehear.

Petitioners now make the same argument in claiming a conflict between the Tennessee Supreme Court and the Sixth Circuit.

Respondent respectfully contends that there is no such conflict and that the Tennessee Legislature has never rescinded the waiver of the Eleventh Amendment set forth in the Charter of the University.

The Tennessee decisions cited by the Petitioners dealing with the sovereign nature of property held by The University of Tennessee are inapplicable to the question of whether Respondent's judgment against Petitioners is barred

by the Eleventh Amendment. Those cases do not deal with or discuss the status of the trustees of the University under the Eleventh Amendment.

Further, the charter of the University permitting its trustees to sue and be sued has never been amended to delete such a provision, though the charter was amended as recently as 1971. Public Acts of 1971, Chapter 352. If the Tennessee Legislature does not want the trustees of The University of Tennessee to sue and be sued, its readily available remedy is to amend the University's charter.

It is thus the Respondent's position that *Tennessee Code Annotated* §20-1702 was not meant to and does not apply to Petitioners. If the Tennessee Legislature had intended to reinstate Eleventh Amendment immunity for the trustees of the University it would have done so by amending the act or charter which waived that immunity.

Respondent further contends that the judgment awarded him against Petitioners in effect amounts to the salary to which he is rightfully entitled, rather than a damage judgment or retroactive award as contemplated by *Edelman v. Jordan*, 414 U.S. 1301 (1974).

When the District Court and the Court of Appeals found that Respondent's termination was without minimal due process, said termination was rendered illegal, null and absolutely void. Accordingly, Respondent should be treated as being still employed by and a present member of the faculty of The University of Tennessee. As such he is entitled to his full salary from August 31, 1973, until the adverse completion of an appropriate due process hearing. *Zimmerer v. Spencer*, 485 F.2d 176 (5th Cir. 1973).

Respondent also urges that the relief awarded by the District Court should be considered salary to which he is entitled as a present member of the faculty since the Court did not order Petitioners to hold a due process hearing, but left it to their discretion. (A. 26). The option given to Petitioners to not hold a due process hearing only makes sense if the Court's ruling is construed as intending to treat Respondent as a current member of the faculty. Otherwise, the University could choose to hold no due process hearing. The University would thereby avoid the risk of being unable to prove Respondent's termination was for a justifiable cause and yet not be faced with any obligation towards Respondent by way of a retroactive award or salary commitment. Under this interpretation, it would obviously be to the University's advantage to hold no due process hearing. In that event, Respondent would continue being without any income, the University would not have had to pay out any salary, and Respondent could not expect to ever receive a due process hearing. Thus, only if the Court's ruling is considered an award of salary to which the Respondent is justly entitled as a current member of the faculty does the granting of the option to the Petitioners to hold a due process hearing make sense. *Wellner v. Minnesota State Junior College Board*, 487 F.2d 153 (8th Cir. 1973); *Stewart v. Pearce*, 484 F.2d 1031 (9th Cir. 1973).

Furthermore, if the District Court had categorically ordered that a due process hearing be held, but had awarded no back pay, the Court would have placed the burden of absorbing the costs of the delay in holding a due process hearing, which has been caused by Petitioners, on Respondent. Such a holding would not only have produced a grossly inequitable result, but it might also have given rise to a serious problem. If a due process hearing were held on

August 31, 1975, and Respondent succeeded in convincing an appropriate body that there were no grounds on which to terminate him, would Respondent be reinstated at that point and start receiving his salary from that date forward? Would that mean that Respondent would never be compensated for the two years he missed as a result of the University's denial of his constitutional rights? Would it be fair to require Respondent to absorb two years loss plus his litigation expenses to right a wrong perpetrated by Petitioners?

Respondent contends that these questions should be answered in the negative and that the only relief that makes sense and constitutes justice in this case is that awarded by the District Court and affirmed by the Sixth Circuit — Respondent is to receive his salary from August 31, 1973, until the University grants him a due process hearing.

Though Petitioners now argue that Respondent should not be entitled to back pay, they too recognize that in this type of situation it is only fair that a faculty member who is entitled to a due process hearing be awarded his salary during the pendency of such proceedings, or even in the event of suspension, until and unless he is adjudged guilty.

> The administration may for grave cause suspend an accused faculty member pending immediate investigation and speedy hearing, or, on recommendation of the faculty and administration committee, the administration may suspend a faculty member for cause. In any case of suspension ***the accused faculty member should suffer no loss of salary*** unless he is adjudged guilty and his appointment is terminated, in which event the committee, subject to the approval of this Board, will determine the date of termination. Faculty Handbook, The University of Tennessee, Knoxville, Approved

> by Board of Trustees, 1957 (Revised 1970), Chapter V, page 21. (Emphasis added).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

BERNARD E. BERNSTEIN
CHARLES D. SUSANO, JR.
L. CAESAR STAIR III
1200 Hamilton National Bank Bldg.
Knoxville, Tennessee 37902
Telephone: 615-546-8030

Attorneys for Respondent

BERNSTEIN, DOUGHERTY & SUSANO

Of Counsel

APPENDIX A

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
Supreme Court Building
Nashville, Tennessee 37219

OPINION NO. 28

TO: State Board of Regents
DATE: August 20, 1974

QUESTION

Concerning the constitutional validity of T.C.A. §49-1303. This statute bars aliens from permanent teaching positions in public colleges and schools, but permits temporary employment of aliens as teachers in the college and university levels. If valid, it prohibits an alien from achieving tenure.

OPINION AND ANALYSIS

On June 25, 1973, the United States Supreme Court, by a margin of 8-1, struck down a New York statute which provided that only citizens of the United States could hold permanent positions in the competitive class of the state Civil Service. *Sugarman v. Dougall*, 93 S.Ct. 2342 (1973). This opinion did not go so far as to hold that a State could not lawfully establish a citizenship requirement where there is a legitimate state interest to be furthered thereby. But insofar as T.C.A. §49-1303 relates to employment in Higher Education, it prohibits only the achievement of tenure by non-citizens. Under this statute aliens can hold

and have held teaching positions for several years in Tennessee's Public Institutions of Higher Education. We are unable to see how T.C.A. §49-1303 furthers any legitimate state interest as that term is defined by the *Sugarman* case.

It is the opinion of this office that, insofar as it relates to employees in public higher education, T.C.A. §49-1303 is unconstitutional.

W. HENRY HAILE
Assistant Attorney General

APPENDIX B

THE KNOXVILLE NEWS-SENTINEL

June 19, 1975

Page 2, Column 3

9 NON-CITIZENS GIVEN UT TENURE

Nine UT professors who are not U.S. citizens have been given tenure by the University, the first time this has happened.

"All of these are in the U.S. on permanent resident visas and it expected all will be granted citizenship," Dr. John Prados, vice president of academic affairs today told the Board of Trustees.

The non-citizens were part of 156 professors granted tenure today by the board. The decision came from a ruling by the state attorney general that present Tennessee law may be unconstitutional. He based his ruling on a recent U.S. Supreme Court decision that struck down a similar New York law prohibiting tenure for non-citizens.

The Board of Regents, the regulatory body for the six state and 10 community colleges besides UT, has already granted tenure to non-citizen professors in other Tennessee universities.

Supreme Court, U. S.
FILED
JAN 12 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-158

BOARD OF TRUSTEES OF THE UNIVERSITY
OF TENNESSEE and EDWARD J. BOLING,
Petitioners,

v.

DR. RAJ P. SONI,
Respondent.

SUPPLEMENTAL BRIEF

BEAUCHAMP E. BROGAN
General Counsel
The University of Tennessee
810 Andy Holt Tower
Knoxville, Tennessee 37916

RONALD C. LEADBETTER
Staff Attorney

Attorneys for Petitioners

TENNESSEE LAW PRINTERS, P. O. Box 277, Knoxville, Tennessee, Phone 525-4202

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BOARD OF TRUSTEES OF THE UNIVERSITY
OF TENNESSEE and EDWARD J. BOLING,
Petitioners,

v.

DR. RAJ P. SONI,
Respondent.

SUPPLEMENTAL BRIEF

In their PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, Petitioners presented to this honorable Court:

QUESTION 4

DOES THE PROVISION OF THE CHARTER OF THE UNIVERSITY OF TENNESSEE THAT THE UNIVERSITY MAY "SUE AND BE SUED" CONSTITUTE A WAIVER OF THE UNIVERSITY'S ELEVENTH AMENDMENT IMMUNITY AS A STATE AGENCY, SUCH THAT THE PROP-

ERTY OF THE UNIVERSITY IS SUBJECT TO DIVESTITURE THROUGH EXERCISE OF JUDICIAL POWER? *Petition*, p. 17.

Petitioners contended, and contend, that there is a conflict between the Tennessee Supreme Court and the Sixth Circuit in an interpretation of Tennessee law in answering this question. *Ibid.*

On December 15, 1975, the Tennessee Supreme Court issued an opinion which lucidly reaffirms that conflict. *Terry Robert Riddle v. City of Johnson City*, ___ Tenn. ___ (1975). Since the *Riddle* opinion was issued subsequent to the date on which Petitioners filed their PETITION FOR A WRIT OF CERTIORARI (July 28, 1975), Petitioners file this SUPPLEMENTAL BRIEF for the purpose of bringing the *Riddle* opinion to this Court's attention (a copy of the opinion is included herein as Appendix A).

In the *Riddle* case, the Tennessee Supreme Court stated:

> "The appellant argues that Chapter 189 of the Private Acts of Tennessee, providing that the City of Johnson City '. . . shall sue and be sued . . .' amounts to a waiver of the governmental immunity of the City. Appellant concedes that this question was settled by the Tennessee Court of Appeals, with certiorari being denied, in *McMahon v. Baroness Erlanger Hospital*, 43 Tenn. App. 128, 306 S.W.2d 41, but it is argued that this Court should now disagree with the holding in that case and reverse the instant case. In further support of this argument appellant relies on the Federal Court decision of *Soni v. Board of Trustees*, Sixth Circuit for the United States, No. 74-1602, in which case the Court held that the legislature had

> waived the University's immunity when it enacted the 1807 charter of the University of Tennessee by authorizing the University to 'sue and be sued.' Certainly as appellant concedes *Tennessee is not bound to adopt nor follow the Federal opinion*." (pp. 3-4) (Emphasis added.)

Petitioners respectfully contend that the phrase "sue and be sued" contained in the Charter of The University of Tennessee cannot have two directly conflicting meanings, and that the Federal Court was bound to follow the State's Supreme Court in its interpretation of state law. The conflict thus existing between the Tennessee Supreme Court and the Sixth Circuit Court of Appeals should be resolved by this Court.

Should this Court decline to resolve the conflict, petitioners, the governing board and president of The University of Tennessee, remain subject to the extremes of either *no* monetary liability or *unlimited* monetary liability in future lawsuits depending to a large extent on the whim of prospective plaintiffs as to which Court they choose to litigate in.

As urged in their PETITION FOR A WRIT OF CERTIORARI, page 19, Petitioners ask that certiorari be granted in order to permit thorough briefing and argument of this question by both parties in order to resolve a conflict which threatens a most serious financial impact on the University of Tennessee and the State of Tennessee.

Respectfully submitted,

BEAUCHAMP E. BROGAN
General Counsel
The University of Tennessee
810 Andy Holt Tower
Knoxville, Tennessee 37916

RONALD C. LEADBETTER
Staff Attorney

Attorneys for Petitioners

APPENDIX A

IN THE SUPREME COURT OF TENNESSEE AT KNOXVILLE

[fol. 1]

TERRY ROBERT RIDDLE,
Appellant

VS

CITY OF JOHNSON CITY,
Appellee

WASHINGTON COUNTY CIRCUIT
JOHNSON CITY LAW COURT

Honorable Walter B. Garland, Judge

For Appellant:

Dan M. Laws
Elizabethton, Tennessee

Rowland E. Verran
Johnson City, Tennessee

For Appellee:

James H. Epps, III
Howell H. Sherrod, Jr.
Johnson City, Tennessee

AFFIRMED

Oris D. Hyder,
Special Justice

[fol. 2]

OPINION

(Filed December 15, 1975)

Appellant was employed in the sewer department of the defendant City and his action was for damages he alleges he sustained when he was thrown from a city vehicle in route between jobs. Upon motion of the City the trial judge dismissed the complaint for failure to state a claim upon which relief could be granted. The case is here on a direct appeal.

Appellant argues that this action may be maintained on three separate theories: (1) the transporting of sewer employees between jobs in city owned and operated vehicles is a proprietary function; (2) the legislature has

removed the City's immunity on suits brought by its employees who are in a master-servant relationship by enactment of the Occupational Safety and Health Act of 1972, T.C.A. 50-501, et seq.; and (3) that the legislature, in enacting Article I, Section 2 of Chapter 189 of the Private Acts of 1939, waived the City's immunity when it allowed the City of Johnson City to "sue and be sued, implead and be impleaded in all courts of law and equity and in all actions whatsoever." Subsequently appellant filed a supplemental assignment of errors and brief contending that "If the City of Johnson City is immune from suits of this nature, then the doctrine of immunity should be abrogated by the Court."

While the appellant does not contend that the operation of the sewer department of the City is a proprietary function, he does argue that the transporting of sewer employees between jobs constitutes a proprietary rather than a governmental function. He cites the New Jersey holding that a municipality conducting the business of operating a sewerage plant for profit was not carrying on a governmental function, and was, therefore, liable for an injury caused by the negligent operation of one of its trucks while being used in such business. *Morgenwick v. Egg Harbor City* (1929) 106 N.J.L. 141, 147 A. 468. He also relies on a holding by the Tennessee Court of Appeals, Middle Division, that allowed an employee of a street patching crew to recover from the City of Nashville for personal injuries sustained when the employee was thrown from the open bed of a truck being used to transport the employee from one street job to another. *Urmann v. City of Nashville*, 44 Tenn. App. 36, 311 S.W.2d 618 (1957). These cases are distinguishable from the facts in the instant case. In *Morgenwick* the sewer-
[fol. 3] age plant and the use of its vehicle were found

to be proprietary, and not governmental. In *Urmann* the Court found the function being performed by the City was proprietary in that the entire factual situation was related to street maintenance and repair.

Tennessee, following the common law, has held that a municipality is liable in tort only if acting in a private or proprietary capacity. A municipality is immune from suit in tort if acting in its governmental capacity. *City of Nashville v. Burns*, 131 Tenn. 381, 174 S.W. 1111; *Vaughn v. City of Alcoa*, 194 Tenn. 449, 251 S.W.2d 304. Also the establishment, maintenance and operation of a sewer system by a city is a governmental function in Tennessee. *Patterson v. City of Chattanooga*, 192 Tenn. 267, 241 S.W.2d 291; *Campbell v. City of Knoxville*, 505 S.W.2d 710.

In his complaint the appellant says that ". . . to perform his duties in various parts of the City . . . the defendant furnished to the plaintiff as part of his employment the necessary transportation in which to travel to various sections of the City of Johnson City, Tennessee to perform his duties." This falls within the purpose and character of a method of operation which is performed for the common good of all and not for the special benefit or profit of the corporate entity.

The Tennessee Occupational Safety and Health Act of 1972 sets out the rights and duties of employees in relation to said Act. No cause of action is established on behalf of any employee in the form of a civil action for damages against the employer. We can imply no cause of action growing out of legislative acts unless the legislature clearly and unmistakably discloses an intent to permit such action. *Scates v. Board of Commissioners*

of Union City, 196 Tenn. 274, 265 S.W.2d 563. No such intent is disclosed in the Tennessee Occupational Safety and Health Act of 1972.

The appellant argues that Chapter 189 of the Private Acts of Tennessee, providing that the City of Johnson City ". . . shall sue and be sued . . ." amounts to a waiver of the governmental immunity of the City. Appellant concedes that this question was settled by the Tennessee Court of Appeals, with certiorari being denied, in *McMahon v. Baroness Erlanger Hospital*, 43 Tenn. App. 128, 306 S.W.2d 41, but it is argued that this Court should now disagree with the holding in that case and re-

[fol. 4] verse the instant case. In further support of this argument appellant relies on the Federal Court decision of *Soni v. Board of Trustees*, Sixth Circuit Court for the United States, No. 74-1602, in which case the Court held that the legislature had waived the University's immunity when it enacted the 1807 charter of the University of Tennessee by authorizing the University to "sue and be sued." Certainly as appellant concedes Tennessee is not bound to adopt nor follow the Federal opinion.

In 1973 the General Assembly of Tennessee enacted the Governmental Tort Liability Act, T.C.A. Sec. 23-3301 et seq. T.C.A. 23-3308 expressly removes immunity for injury from negligent operation of motor vehicles. As originally enacted a local political body had the option to exempt itself under certain conditions. We assume the City of Johnson City to be exempt pursuant to Section 23-3303 of the Code by the failure of appellant to raise the issue in response to the City's plea of governmental immunity. In *Johnson v. Oman Construction Company*, 519 S.W.2d 782 at page 786 (Tenn. 1975) we considered this statute and stated:

"We do not regard this statute as dealing with the subject in a complete or comprehensive manner. We are reluctant to take judicial action in this area, however, without giving the General Assembly an opportunity to establish a comprehensive and uniform tort claims procedure governing suits against cities, counties and other political subdivisions or their agencies in the duly constituted courts of the State."

Subsequent to the *Johnson* decision, the General Assembly enacted Chapter 252 of the Public Acts of 1975 which removed the option of the local government to exempt itself from the Government Tort Liability Act. Chapter 252 provides that the governmental units that have exempted themselves from the Act would automatically be subject to the provisions of that Act for all claims or actions arising after January 1, 1976. After that date, this category of tort claims will be stripped of the shield of governmental immunity in all of the counties and cities of this State.

The legislature has given the local governments what it considers to be appropriate time to adjust their procedures and to take adequate steps to protect against the consequences of a change in the law of governmental immunity. It would be inappropriate for us to judicially accelerate the tort liability of counties and cities in the present and prospective state of the law.

[fol. 5] The trial judge was correct in holding that under existing Tennessee law the appellant failed to state a claim upon which relief could be granted. His Order of Dismissal is affirmed. The costs are adjudged against appellant.

/s/ Oris D. Hyder

Oris D. Hyder, Special Justice.

Fones, C.J.; Harbison and Cooper, JJ., concur

Henry, J., dissenting

IN THE SUPREME COURT OF TENNESSEE

AT

[fol. 1] KNOXVILLE

TERRY ROBERT RIDDLE
VS
CITY OF JOHNSON CITY
} WASHINGTON LAW

DISSENTING OPINION

(Filed December 15, 1975)

I respectfully dissent. My reasons for being unalterably opposed to the doctrine of governmental immunity are fully set forth in *Cooper v. Rutherford County*, ___ S.W.2d ___ (Tenn. 1975) and need not be repeated here.

This case, however, raises other questions which I shall now address.

Chapter 189 of the Private Acts of 1939 contains the Charter of the City of Johnson City. Section 2, provides, in pertinent part, that it

> (S)hall *sue and be sued, implead and be impleaded* in all courts of law and equity, and *in all actions whatsoever* . . .
> (Emphasis supplied)

The majority, relying upon *McMahon v. Baroness Erlanger Hospital*, 43 Tenn. App. 128, 306
[fol. 2] S.W.2d 41 (1957), holds by implication that this Charter provision does not constitute a waiver of governmental immunity.

I agree that *McMahon* so holds – without citing any authority, without giving any reasons and without any comment except that "(t)his phraseology is common to most charters of municipal as well as private corporations."

This reasoning completely overlooks the fact that a holding that the city may not be sued is tantamount to a holding that the city may not sue. A decent regard for the plain provisions of the charter demands this conclusion. Tennessee municipalities have only such powers as are conferred by the Legislature. The same charter provision that authorized cities to sue authorizes them to be sued and to be impleaded in all actions whatsoever. These rights are inseparable. If the one exists, so must the other. I am unwilling to nullify the Charter of Johnson City by stripping the city of its right to sue or by holding that it may not be sued. Such a holding is in the very teeth of express legislative conference of powers, and, if carried to its logical conclusion will deal the cities of Tennessee a body blow in that their right to sue will be discontinued, with devastating results.

Appellants rely upon *Soni v. Board of Trustees of University of Tennessee*, 513 F.2d 347 (6 Cir. 1975). This was a suit against the University of Tennessee whose charter provides that the Trustees

> (M)ay sue and be sued, plead and be impleaded, in any court of law or equity in this State or elsewhere.
> 513 F.2d at 352

The Court, speaking through Chief Judge
[fol. 3] Phillips described this as an "unrestricted right to sue and be sued," and designated it as "sweeping" and "general" consent.

The majority opinion states, with reference to *Soni* that "Tennessee is not bound to adopt nor to follow the Federal opinion." I agree that Federal decisions are not binding. But Tennessee is bound to adopt and follow any decision that announces a rule of law that is demanded by the justice of the cause and is dictated by the promptings of fundamental fairness. Better to follow the Federal Courts than to fall into the quagmire created by our own courts as we attempt to perpetuate doctrines and defenses that are foreign to contemporary American jurisprudence.

HENRY, J.